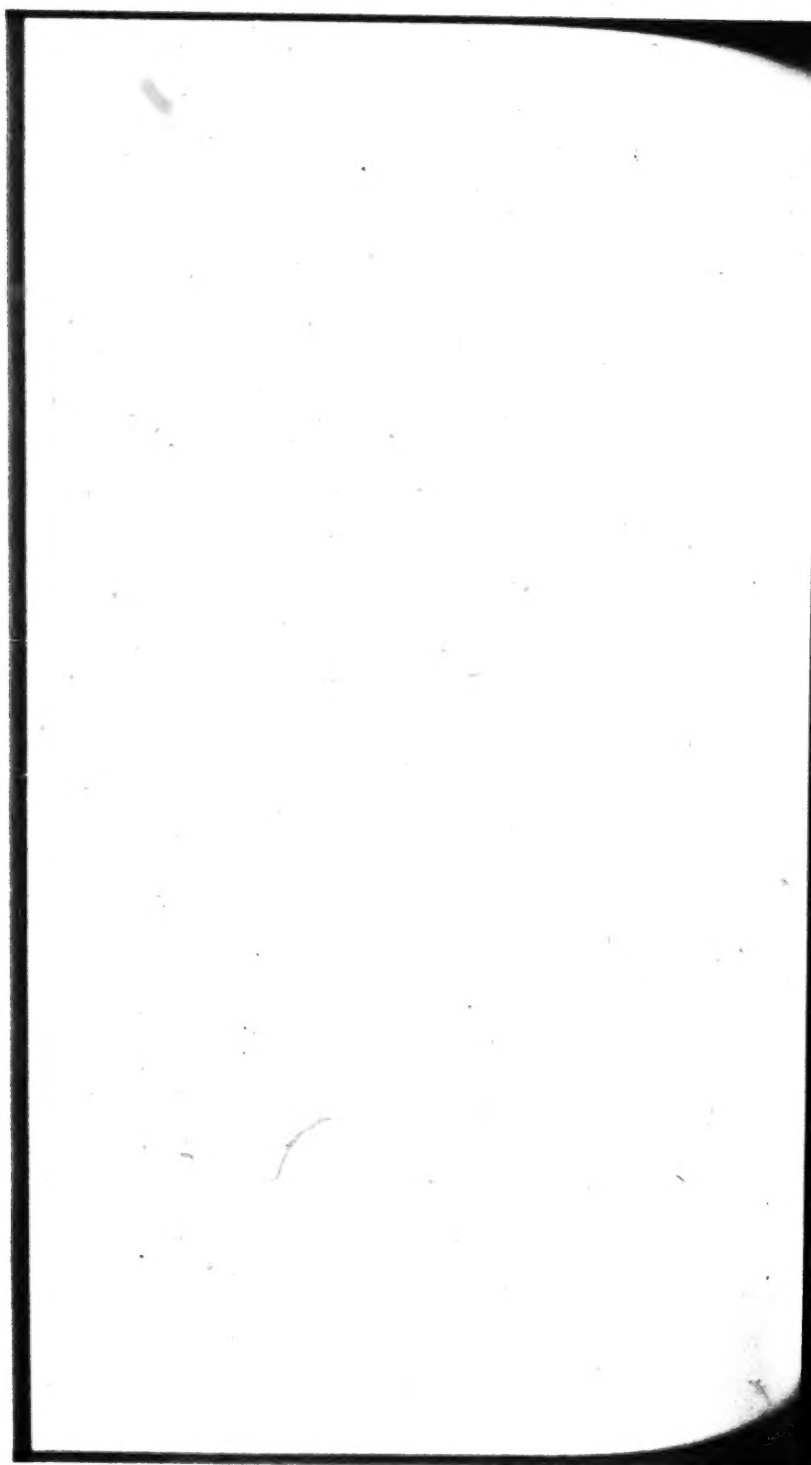


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DOCKET ENTRIES

CIVIL DOCKET UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

CIVIL No. 18248-2

1970

Proceedings

- Apr 6 Complaint -filed.
Writ and 10 copies issued and delivered to the U.S. Marshal. -filed.
Application(s) (2) & Order Appointing Next Friends -filed.
- Apr 14 Writ bearing return of U.S. Marshal on April 10, 1970 -filed.
Writ bearing return of U.S. Marshal on Dale M. Thompson on April 6, 1970 -filed.
- Apr 22 Plaintiff's Interrogatories to Hubert Wheeler -filed.
Plaintiffs' Interrogatories to Missouri State Board of Education -filed.
Entra (sic) of Appearance of Kuraner, Oberlander, Lamkin & Dingman as attorneys of record for the defendants -filed.
Pre-Trial Order No. 1 -filed. (Discovery by July 20, 1970).
- Apr 23 Motion for Extension of time within which to plead, with suggestions in support -filed.
Order extending to May 20, 1970, for defendants to plead -filed.
- Apr 27 Motion and Memo in support to extend time to answer interrogatories -filed.

- May 1 Stipulation designating action as protracted and complex -filed.
Suggestions in opposition of motion to extend time to answer interrogatories -filed.
- May 14 Order extending time in which defts may object to interrogatories -filed.
- May 25 Order extending time to plead -filed.
Motion & suggestions to extend time to answer or object to plaintiffs' interrogatories -filed.
Motion & suggestions to dismiss or in the alternative for stay of Proceedings -filed.
- Jun 3 Suggestions in opposition to defendants' motion to answer interrogatories -filed.
Suggestions in opposition of motion to dismiss or in the alternative for a stay of proceedings -filed.
- Jun 19 Order -for pretrial conference set for July 8, 1970 at 9:30 a.m. -filed.
- Jul 6 Notice to counsel on discovery -filed.
- Jul 13 Pretrial Order -filed. (Pretrial Order No. 1 is hereby set aside and this case is denominated a protracted case).
- Jul 17 Answers or responses to interrogatories -filed.
- Jul 24 Defendants' objections to plaintiffs' interrogatory No. One -filed.
- Jul 31 Order -filed.
Suggestions in opposition to defendants' objection to plaintiffs' interrogatory No. One -filed.
Motion & Brief in support for Partial Summary Judgment -filed.
Plaintiff's narrative statement of facts for purposes of Partial Summary Judgment -filed.

- Aug 14 Motion, Suggestions & Order extending time to answer interrogatory -filed.
Motion & suggestions for extension of time to respond to plaintiff's motion for Partial Summary Judgment -filed.
- Aug 17 Answers to interrogatories -filed.
Suggestions in opposition to defendants' motion to extend the time for responding to plaintiffs' motion for Partial Summary Judgment and completing the Order Action required by Pretrial Order -filed.
Answers to interrogatories -filed.
- Aug 31 Order of Dismissal -filed. (Dismissed without prejudice)
- Sep 10 Notice of Appeal -filed.
Bond for Cost on Appeal -filed.
- Sep 16 Transcript of Record on Appeal mailed to Court of Appeals.

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- May 25 Judgment of U. S. Court of Appeals -filed. (Ordered and adjudged that the Judgment of the said District Court, be, and the same is hereby reversed. And it is further Ordered by this Court that this cause be and is remanded . . for further proceedings consistent with the opinion of this Court this day filed herein.)
Costs taxed in favor of Appellants. (for recovery from defendants)

REOPENED

- Jun 4 Answer of defendants -filed.
- Jul 29 Order -that all discovery in this case will be closed on Sept. 3, 1971 -filed.

- Aug 11 Notice to take Depositions -filed.
- Aug 24 Order for return of Costs Bond on Appeal -filed.
- Aug 31 Defendants' response to plaintiffs' Narrative Statement of Facts for purposes of Partial Summary Judgment -filed.
- Sep 9 Order setting Pre-Trial Conference for September 22, 1971 -filed.
- Oct 12 Motion & Suggestions to add additional parties Defendants -filed.
Application & suggestions for Preliminary Injunction -filed.
- Oct 15 Response to plaintiffs' motion to add additional parties defendant -filed.
- Nov 12 Request for Production of Documents under Rule 34 -filed.
- Nov 23 Response of defendant Missouri State Board of Education to plaintiffs' request for production of documents under Rule 34 -filed.
- Dec 1 Order Granting motion to add Parties Defendant -filed. (Harvey B. Young, Jr., and Eleanor B. Griffith as members of Mo. State Board of Education & Arthur L. Mallory added as Commissioner of Education, State of Missouri).
- Dec 1 Order -filed. (Plaintiffs' to file narrative statement by December 13, 1971; defendants to reply within 10 days thereafter; Hearing on the temporary injunction is set on Tuesday, December 28, 1971, at 10:00 a.m.)
- Dec 13 Plaintiffs Narrative Statement of Facts for purposes of Preliminary Injunction -filed. (Exhibits submitted)

Dec 22 Defendant's Narrative Statement of Facts in opposition to plaintiffs' application for Preliminary Injunction -filed.

Defendants' Response to plaintiffs' Narrative Statement of Facts for purposes of Preliminary Injunction -filed.

Dec 28 Plaintiffs Response to defendants Narrative Statement of Facts in opposition to plaintiffs Application for Preliminary Injunction -filed.

1972

Jan 12 Deposition of Hubert Wheeler on the part of plaintiffs -filed.

Deposition of Daryle D. McCullough on the part of plaintiffs -filed.

Jan 18 Pretrial Order -filed. (This case is set for trial on February 22, 1972, at 9:30 a.m. on the sole issue of whether or not a Permanent Injunction should be entered in favor of plaintiffs; this does not limit counsel on other evidence at a later trial on any of remaining issues.)

Feb 11 Standard Pretrial Order No. 4 Form mail to counsel this date. -filed.

Order -filed. (American Civil Liberties Union of Western Missouri and Greater Kansas City is granted leave to an amicus curiae brief on or before Feb. 17, 1972.)

Feb 15 Amicus Curiae Brief of the American Civil Liberties Union of Western Missouri and Greater Kansas City -filed.

Feb 16 Plaintiffs' statement of unstipulated facts and plaintiffs' designation of witnesses -filed.

Feb 17 Motion with supporting suggestions for protective order by defts. -filed.

Writ of subpoena to produce showing service on 2-15-72 as to P. J. Newell, Jr. -filed.

Writ of subpoena to testify showing service on Hubert Wheeler on 2-15-72 -filed.

Motion by applicants for intervention to intervene as defendants -filed.

- Feb 18 Stipulation of facts and issues -filed.
 Defendant Wheeler's motion to quash subpoena with suggestions -filed.
 Defendants' statement of unstipulated facts and defendants' designation of witnesses -filed.
- Feb 22 Brief of defendants -filed.
 Plaintiffs trial brief -filed.
 Respective parties appear by counsel for trial. Trial is to the Court and limited to the sole issue of whether a permanent injunction should be entered. Plaintiff introduces testimony and rests. Defendant introduces testimony and rests. Respective counsel are granted ten (10) days after delivery of transcript to file briefs. Exhibit list -filed.
- Mar 7 Plaintiffs' abstract from depositions -filed.
- Mar 9 Transcript of Proceedings of February 22, 1972 -filed.
- Mar 17 Suggestions in opposition to motion by John M. Swomley, Jr., et al to intervene as defendants -filed.
- Mar 20 Supplemental brief of plaintiffs -filed.
 Post Trial Brief of defendants -filed.
- Mar 24 Plaintiffs' reply to new matter in defendants' post-trial brief -filed.

- Jun 2 Memorandum and Opinion -filed. (ORDERED that plaintiffs' prayer for an injunction in this case be and is hereby denied. -filed.)
- Jun 8 Order directing the entry of a Final Judgment -filed. (ORDERED that the Court's Memorandum and Order filed herein on June 2, 1972, shall be designated a final judgment as to plaintiffs' claims for injunctive relief; and FURTHER ORDERED that the Clerk is hereby directed to enter a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. Defendants' counsel are directed to file a form of final Judgment with the Clerk within five days from this date.)
- Jun 12 Judgment -filed. (It is ordered and adjudged that: plaintiffs' prayer for an injunction is denied; denial of prayer for injunctive relief does not adjudicate other claims of the parties; there is no just reason for delay in this matter and plaintiffs' should be entitled to appeal from the Court's Memorandum and Order filed herein on June 2, 1972; the Court's Memorandum and Order filed herein on June 2, 1972, is designated as a final judgment as to plaintiffs' claims for injunctive relief and plaintiffs are entitled to appeal therefrom; that all costs of this action are taxed to the plaintiffs.)
- Jun 30 Notice of Appeal -filed.
Bond for cost on Appeal -filed.
- Jul 13 Transcript of Record on Appeal to Court of Appeals
- 1973
- May 1 Judgment of United States Court of Appeals for the Eight Circuit of April 27, 1973 -filed. [. . . it

is now here ORDERED and ADJUDGED by this Court that the judgment of said District Court in this cause be, and the same is hereby, reversed. And it is further ORDERED by this Court that this cause be, and it hereby, remanded to the said District Court for proceedings in accordance with the majority opinion of this Court. . .]

Cost statement mailed

- May 9 Injunction and Judgment issued in compliance with Mandate -Filed. (In accordance with Mandate received from the Court of Appeals for the Eighth Circuit: The defendants and each of them are hereby perpetually enjoined and restrained as follows: 1. When the needs of eligible children require it, special personnel services may be furnished under Title I of the Elementary and Secondary Education of 1965 by the public agency on private as well as public school premises. 2. Based on deter,omed meed, (sic) all Title I ESEA Applications shall provide services and activities to private school pupils as to those provided public school pupils. 3. Transportation free to private school pupils as to those provided to public school pupils. 4. Applications under Title I ESEA, shall evidence that knowledgeable persons have been consulted in planning and evaluation of Title I projects. 5. Defendants enjoined from approving applications by LEA for a Title I Grant unless such application complies with this Mandate. 6. Defendants are ordered to conform all regulations, instructions, etc., to the provisions of this Order and Mandate. 7. Defendants are ordered to noticy (sic) all public school and private school administrators of the rights of private school pupils by distributing to them a copy of

this Injunction and Judgment. 8. Defendants to make available on a permanent basis for inspection and copying by the plaintiffs all records and documents regarding ESEA. 9. IT IS ORDERED that this Injunction and Judgment shall be effective forthwith and that this Court retains continuing jurisdiction of this litigation. Costs to be eaxed (sic) to defendants. WRC) copies mailed to list received from secretary to Judge Collinson.

May 30 Application for refund -filed.

Order on Application of plaintiffs -filed. [it is ORDERED that the Two Hundred Fifty Dollars (\$250.00) bond deposited in the Court by plaintiffs be returned to plaintiffs]

June 6 Notice of Appeal - filed. Copies mailed to counsel.

COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 18248-2

ANNA BARRERA, individually, and as Next Friend for JOANNA BARRERA, PATRICIA BARRERA, DIANA BARRERA, MARIA BARRERA, minors, 2706 Madison, Kansas City, Missouri, ODIS BROWN, individually and as Next Friend for RICHARD BROWN, a minor, 1930 East 17th Street, Kansas City, Missouri, BILLIE HAYES, individually and as Next Friend for ELAINE HAYES, EVELYN HAYES, GEORGE HAYES, BILLY JOE HAYES, minors, 2729 Highland, Kansas City, Missouri, GARRETT JONES, individually and as Next Friend for JANICE JONES, a

minor, 3222 Victor, Kansas City, Missouri, VINANCIO REA, individually and as Next Friend for ESTEBEN REA, a minor, 1625 Summit, Kansas City, Missouri, PAUL ROJAS, individually and as Next Friend for YOLANDA ROJAS, MARIO ROJAS, KATRINA ROJAS, minors, 2008 Jefferson, Kansas City, Missouri, PATRICIA WYATT, individually and as Next Friend for KEVIN WYATT, 2905 East 29th Street, Kansas City, Missouri, RAFAEL ZAPIEN, individually and as Next Friend for ANNA LISA ZAPIEN, REGINA ZAPIEN, HOPE ZAPIEN, RUBY ZAPIEN, minors, 2305 Summit, Kansas City, Missouri,

PLAINTIFFS,

vs.

HUBERT WHEELER, individually and in his capacity as COMMISSIONER OF EDUCATION, STATE OF MISSOURI, Jefferson Building, Jefferson City, Missouri, MISSOURI STATE BOARD OF EDUCATION, Serve J. Warren Head, President and Chief Executive Officer, Jefferson Building, Jefferson City, Missouri, J. WARREN HEAD, individually and as President and Chief Executive Officer of State Board of Education, Palmyra, Missouri, DALE M. THOMPSON, individually and as member of the State Board of Education, Seventh Floor, City National Bank Building, Kansas City, Missouri, MRS. TRUE DAVIS, individually and as member of the State Board of Education, 503 N. 5th Street, St. Joseph, Missouri, JACK WEBSTER, individually and as member of the State Board of Education, 2400 East Bennett, Springfield, Missouri, ELSTON J. MELTON, individually and as member of the State Board of Education, Boonville, Missouri, W. CLIFTON BANTA, individually and as member of the State Board of Education, 701 East Cypress, Charleston, Missouri, SIDNEY R. REDMOND, individually and as member of the State Board of Education, 705 Chestnut Street, St. Louis, Missouri, F.

BURTON SAWYER, individually and as Vice-President
and member of the State Board of Education, 919 West
Adams Avenue, Kirkwood, Missouri,

DEFENDANTS.

COUNT ONE

Come now the Plaintiffs and for their cause of action
in Count One of their Complaint herein state to the Court
as follows:

1. The action arises under: The First Amendment
to the Constitution of the United States; The Fourteenth
Amendment to the Constitution of the United States, Sec-
tion 1; Title 42, United States Code, Section 1983 (Act of
April 20, 1871, 17 Stat. 13); Title 20, United States Code,
Sections 241a through 241m, 242, 243, and 244 (Public
Law 89-10 as amended by Public Law 89-750 and Public
Law 90-247), hereinafter referred to as the Elementary
and Secondary Education Act of 1965, as hereinafter more
fully appears; the matter in controversy exceeds, exclusive
of interest and costs, the sum of Ten Thousand Dollars.

2. This action is one to redress the deprivation, un-
der color of state law, statute, ordinance, regulation, cus-
tom, and usage, of a right, privilege or immunity secured
by the Constitution of the United States and by an Act
of Congress providing for equal rights of citizens and of
all persons within the jurisdiction of the United States as
hereinafter more fully appears. Additionally, therefore,
the jurisdiction of this Court is based upon Title 28, United
States Code, Section 1343 (3).

3. The Plaintiffs, Joanna Barrera, Patricia Barrera,
Diana Barrera, Maria Barrera, Richard Brown, Elaine
Hayes, Evelyn Hayes, George Hayes, Billy Joe Hayes, Janice
Jones, Esteben Rea, Yolanda Rojas, Mario Rojas, Katrina

Rojas, Kevin Wyatt, Anna Lisa Zapien, Regina Zapien, Hope Zapien, and Ruby Zapien are minors and appear herein by their Next Friends. Plaintiffs are all residents of the Western District of the State of Missouri and are citizens of the United States. The Infant Plaintiffs are educationally deprived children within economic deprived areas attending nonpublic schools in the Western District of the State of Missouri and are beneficiaries within the definition and intent of the Elementary and Secondary Education Act of 1965.

4. The Plaintiffs, Anna Barrera, Odis Brown, Billie Hayes, Garrett Jones, Vinancio Rea, Paul Rojas, Patricia Wyatt and Rafael Zapien are appearing as Next Friends of the Infant Plaintiffs, and in their own behalf, and are the parents of the respective Infant Plaintiffs, are taxpayers, residents and citizens of the Western District of the State of Missouri, and are parents of educationally deprived children attending nonpublic schools. Some Plaintiffs attend nonpublic schools by reason of their religion, belief and persuasion, and the Plaintiff parents have selected nonpublic schools for the education of their children in the exercise of their duty, responsibility and right to direct the education of their children.

5. The Infant Plaintiffs are members of a class of persons throughout the State of Missouri who are educationally deprived children attending nonpublic schools in the State of Missouri and the intended beneficiaries of the Elementary and Secondary Education Act of 1965, Title I, or are the parents and natural guardians thereof. The members of the class are very numerous and it is impracticable to bring them all before the Court. The Plaintiffs will fairly insure the adequate representation of all members of the class. The rights enforced for and on behalf of the members of the class are of a joint and a common

character. The Plaintiffs further state that there are common questions of law and fact involved, and common relief sought.

6. Unless otherwise stated, the term Plaintiffs as used herein is intended to include not only the named Plaintiffs, but also, all members of the class of persons in the State of Missouri similarly situated,—that is, pupils attending private or nonpublic schools who are educationally deprived and otherwise the intended beneficiaries of the Elementary and Secondary Education Act of 1965, Title I, and the parents and natural guardians of such pupils.

7. The Defendant, Hubert Wheeler, is the Commissioner of Education of the State of Missouri and is sued individually and in his official capacity as Commissioner of Education of the State of Missouri. The Defendant Commissioner of Education is a resident of, and maintains his office at Jefferson City, Missouri.

8. All other Defendants are members of the State Board of Education of the State of Missouri, and are sued both as individuals, and in their official capacity as members of the State Board of Education of the State of Missouri. The Defendants, members of the State Board of Education, constitute the state educational agency for the State of Missouri within the definition of the Elementary and Secondary Education Act of 1965, Title I. The official office and principal place of doing business of the State Board of Education is in the Western District of Missouri, and the residence of Defendant Dale M. Thompson is in Jackson County, Missouri, as appears in the caption hereof, and the residence of Defendant Mrs. True Davis is in Buchanan County, Missouri, as appears in the caption hereof, and the residence of Defendant Jack Webster is in Greene County, Missouri, as appears in the

caption hereof, and the residence of Defendant Elston J. Melton is in Cooper County, Missouri, as appears in the caption hereof, and said Defendants are residents of the Western District of Missouri.

9. The acts of the Defendants hereinafter alleged were done and committed within the Western District of Missouri.

10. The Elementary and Secondary Education Act of 1965, Title I, is an Act and Statute of the Congress of the United States wherein the Congress planned and intended to provide financial assistance to local educational agencies serving areas with concentrations of children from low income families to expand and improve their educational programs, which contribute particularly to meeting the educational needs of educationally deprived children, and the Congress likewise made it its policy and intention to provide fair and equal participation in such assistance to those educationally deprived children who were and are enrolled in private and nonpublic secondary and elementary schools. The means, methods and regulations established for implementing and administering the Act provide that plans, projects and programs, as contemplated by Statute, be submitted to the State Board of Education for Missouri, on the condition that such plans, projects and programs provide for fair participation by educationally deprived children in private and nonpublic schools.

11. Under the Act and Federal Regulations, the Defendants review all applications for grants submitted by local educational agencies to determine whether the applications meet the requirements of the Elementary and Secondary Education Act of 1965, and Federal Regulations thereunder, and Defendants are commanded to disapprove such applications unless such applications effectively meet

the requirements of the aforesaid Act and Regulations, and unless the Defendants are able to assure the United States Commissioner of Education of compliance.

12. The Regulations established by the United States Commissioner of Education, at the order and direction of Congress, require that programs under Title I, Elementary and Secondary Education Act of 1965 provide equal educational services designed to meet the educational needs of educationally deprived children including those who are enrolled in private and nonpublic schools. Such children must be provided genuine opportunities to participate on a basis comparable to that used in providing for the participation in the plans and programs for educationally deprived children enrolled in public schools.

13. The Regulations established by the United States Commissioner of Education, at the direction of Congress, further require that representatives of pupils attending private or nonpublic schools participate in the planning, development and evaluation of educational programs under Title I, Elementary and Secondary Education Act of 1965.

14. The Regulations established by the United States Commissioner of Education, at the direction of Congress, authorize school personnel providing special educational services to be made available at the private or nonpublic school or other place where the pupil is located. The Regulations established by the United States Commissioner of Education further make it mandatory that projects and programs envisioned and intended by Title I, Elementary and Secondary Education Act of 1965, be carried out at locations where the needs of educationally deprived children can best be served.

15. In order to participate in the benefits of the Elementary and Secondary Education Act of 1965, the State Board of Education has given assurance to the United States Commissioner of Education that it and its local educational agencies have complied with all the requirements of the Elementary and Secondary Education Act of 1965, and it has assured and continues to assure the United States Commissioner of Education that it and its local educational agencies have and will perform all the obligations imposed by reason of the requirements established by the Elementary and Secondary Education Act of 1965, and the State Board of Education has accepted the conditions, limitations and directions of the Act, and Regulations and orders enacted pursuant thereto.

16. Relying on the assurance as hereinabove set out, Federal funds have been annually allocated and expended under Elementary and Secondary Education Act of 1965, Title I, to Defendants to be used for the benefit of educationally deprived children in Missouri have been as follows:

<u>Fiscal Year</u>	<u>Allocated</u>	<u>Expenditures</u>
1966	\$30,517,473.00	\$23,630,170.00
1967	23,919,082.00	23,293,439.00
1968	24,661,296.00	24,160,970.00
1969	23,127,206.00	22,736,434.00

17. There are One Hundred and Seventy-Four Thousand children enrolled in private or nonpublic schools in the State of Missouri, constituting Sixteen (16%) per cent of the total school enrollment of the State of Missouri and Sixteen (16%) per cent of the educationally deprived children are now enrolled in private or nonpublic schools in the State of Missouri.

18. The Defendants herein, and each of them, and the predecessors of some of them, acting jointly and severally, in their own behalf and in their official positions, and acting separately and individually as well as collectively, from the time of the inception of the implementation of the Elementary and Secondary Education Act of 1965, beginning in October of 1965 and continuing to the date of the filing of this Complaint, have acted, and continued to act, under the color and pretext of state laws, statutes, customs and usages, and have acted under the pretext and color of their assertion that state law prohibits the implementation of the Elementary and Secondary Education Act of 1965 insofar as such act benefits educationally deprived children in private and nonpublic schools, in that the Defendants have acted under the pretext and color of purported state law and usage and have prohibited and refused the providing of educational services in and for private and nonpublic school pupils who are educationally deprived, and have prohibited and refused the furnishing of special instructors and teachers in specific fields for private and nonpublic school children, and acting under the pretext and color of such purported state laws and usages, the Defendants have consistently and willfully denied the Plaintiffs and all other persons in the State of Missouri similarly situated the advantages and benefits of the Elementary and Secondary Education Act of 1965, and have attempted to provide colorable compliance with the Elementary and Secondary Education Act of 1965 by providing classes at public school locations for private and nonpublic school children on Saturdays or late in the evenings or otherwise in such means and other methods that are unsuitable, impracticable and impossible, and in violation of the Act and Regulations, and the Defendants, and each of them, have advised and informed the local educational agencies and school district admin-

istrators throughout the State of Missouri that projects and plans suggested or proposed by such local educational agencies which would provide fair and equal participation by private and nonpublic school children should not be submitted to the State Board of Education, and that the same would be disapproved upon presentation, and the effect and result, as fully intended and planned by the Defendants and each of them and their predecessors, has been to deprive the Plaintiffs, and all persons similarly situated in the State of Missouri, of the benefits and advantages and uses of the Elementary and Secondary Education Act of 1965, as contemplated and directed by the Congress of the United States.

19. That the actions of the Defendants as pleaded herein constitute unlawful and unconstitutional discrimination against the Plaintiffs and others similarly situated, and that this discrimination is violative of the First Amendment of the Constitution of the United States, and is violative of the Section 1 of the Fourteenth Amendment of the Constitution of the United States in that it works an obstacle and hardship upon those exercising their right to select a private or nonpublic school for elementary and secondary education, and is a denial of equal protection of the laws and is a violation of the process of law, and is a deprivation of rights, privileges and immunities secured by the Constitution and Laws as set forth herein and these acts are committed under the color of statute, regulation, custom or usage of the State of Missouri, and are a denial of the Plaintiffs' rights and the rights of those similarly situated in the State of Missouri.

20. Defendants under the color of state laws and regulations have refused and continue to refuse to accept or approve project applications under Title I, Elementary and Secondary Education Act of 1965, by local educational

agencies which would include the use of federally paid personnel on nonpublic school premises.

21. As a result of being deprived of educational benefits by Defendants, Plaintiffs will be less skilled, educated and prepared to obtain gainful employment, exercise civic responsibilities and otherwise beneficially take part in the society in which they mature and live.

22. Defendants have failed to enforce requirements of the Elementary and Secondary Education Act of 1965, that nonpublic school administrators acting in behalf of Plaintiffs participate in the planning, development and evaluation of projects to be implemented under the Elementary and Secondary Education Act of 1965, Title I.

23. Defendants have failed to enforce the requirement of the Elementary and Secondary Education Act of 1965 that pupils of nonpublic schools equitably participate on a basis comparable with other pupils.

24. Defendants, contrary to Law, Regulations and other Directives, and in violation of assurances to the United States Office of Education, failed to disapprove projects of the Elementary and Secondary Education Act of 1965, Title I, which projects violate the Act and Regulations.

25. Defendants' actions have resulted in programs which are both educationally and economically wasteful and unsound, and which fail to meet the special educational needs of Plaintiffs and other educationally deprived children.

26. Defendants, contrary to Federal Law, Regulations and directives, and contrary to the assurances given the United States Commission of Education, have encouraged the unlawful use of Federal funds, in that they have

allowed Federal funds to be used to supplant local educational resources. As a result, Federal funds intended for the benefit of Plaintiffs and other educationally deprived children have been diluted and reduced.

27. Plaintiffs have used and exhausted all informal remedies which may be deemed to have been provided by Law, and Plaintiffs state there are no administrative remedies presently available for the redress of their wrongs and injuries, and Plaintiffs have no adequate, full and complete remedy at law and seek herein equitable relief in the premises, and their damages herein are in the amount of Thirteen Million (\$13,000,000.00) Dollars.

WHEREFORE, the premises considered, in Count One of this Complaint, the Plaintiffs pray the Order and injunction of the Court:

(a) Restraining and enjoining the Defendants from interfering with obstructing or impeding the flow of the advantages and benefits of the Elementary and Secondary Education Act of 1965, to the Plaintiffs herein, and all persons similarly situated as described above.

(b) Ordering and Directing the Defendants, by means of mandatory injunction, to direct and propose plans, and to recommend and suggest projects and plans to local agencies and school districts in the State of Missouri, wherein the Plaintiffs and all persons similarly situated can receive the full and fair benefits of the Elementary and Secondary Education Act of 1965.

(c) Restraining and enjoining the Defendants from discriminating against private and nonpublic school pupils, who are educationally deprived, in any respect relating to the funds, advantages and benefits provided by the Elementary and Secondary Education Act of 1965.

(d) Ordering Defendants to develop with the participation of Plaintiffs and their attorneys a detailed plan to assure that both public and private school administrators are fully informed of the rights of nonpublic school pupils to participate in projects authorized by the Elementary and Secondary Education Act of 1965, Title I, and to devise adequate forms, procedures and other means to ascertain that requirements of Federal Law and Regulation regarding the participation of nonpublic school pupils are fully complied with, and to submit such plan to the Court for approval and enforcement.

(e) Enjoining Defendants from disapproving projects authorized by the Elementary and Secondary Education Act of 1965, which projects include the use of federally paid school personnel on nonpublic school premises.

(f) Enjoining the Defendants from approving any project authorized by the Elementary and Secondary Education Act of 1965 which fails to clearly evidence the actual exercise of the right of representatives of pupils in private or nonpublic schools to participate in the planning, development and evaluation of such projects.

(g) Enjoining the Defendants from approving any project authorized by the Elementary and Secondary Education Act of 1965 which fails to clearly show that provision has been made for equitable participation by pupils of nonpublic or private schools on a basis fairly comparable to the services provided pupils in public schools.

(h) Ordering and directing Defendants to immediately undertake a program through written notices, meetings and public announcements, to inform public school and nonpublic administrators of their rights and duties under the Elementary and Secondary Education Act of 1965, regarding the participation of pupils attending non-public schools.

(i) Ordering and directing Defendants to make available on a permanent and continuing basis, for convenient inspection by Plaintiffs or their representatives during regular office hours, all records and documents regarding the Elementary and Secondary Education Act of 1965, and its implementation in the State of Missouri.

(j) Making and entering its Order and injunction as may be properly and reasonably required to effectuate the Decree and Judgment of the Court herein in providing full and complete remedy to the Plaintiffs and other persons similarly situated under the premises stated herein, and for the costs of the Plaintiffs incurred and expended herein.

COUNT TWO

For Count Two of their Complaint herein, the Plaintiffs state to the Court:

1. That they incorporate all of the allegations contained in Count One of their Complaint as though fully and completely set forth herein.

2. That the Defendants have, and will, deprive the Plaintiffs of their rights, privileges and immunities secured by the Constitution and Laws of the United States, under color of statute, ordinance, regulation, custom and usage of the State of Missouri, and have caused the Plaintiffs to be subjected to a deprivation of their rights, privileges or immunities secured by the Constitution and Laws of the United States.

3. That the Defendants have refused to properly prepare and disseminate information concerning the implementation of the Elementary and Secondary Education Act of 1965, Title I, and have refused and failed to meet and confer with persons necessarily and properly inter-

ested and concerned with the implementation of the Elementary and Secondary Education Act of 1965, Title I, as it relates to pupils attending private and nonpublic schools in the State of Missouri, and the Defendants continue to refuse, and fail to do so although they have been consistently requested to arrange such meetings and to furnish such information.

4. That in October of 1965, the Defendants adopted and promulgated a purported regulation under which they seek to prohibit school and educational personnel employed in implementation of the Elementary and Secondary Education Act of 1965, Title I, from rendering and furnishing educational services to educationally deprived children in and on the premises of nonpublic schools; the Defendants have adopted and enforced this purported regulation, contrary to the counsel, advice and opinion of the Attorney General of the State of Missouri as early as November, 1965, that such regulation was not authorized by State Laws, that such regulation was contrary to the Federal Regulations and that such regulation was in violation of the assurances given to the United States Commissioner of Education by the Defendants herein.

5. That thereafter, on January 29, 1970, the Attorney General of the State of Missouri formulated and issued his official Opinion wherein it was stated that the Laws of the State of Missouri did not prevent or prohibit educational or school personnel, who received compensation from funds derived from the United States pursuant to the Elementary and Secondary Education Act of 1965, Title I, from rendering and providing educational services in and on the premises of private and nonpublic schools in the State of Missouri (See Opinion of the Attorney General, No. 26, Conway, January 29, 1970); that nevertheless, with full knowledge of such Opinion, the Defend-

ants proceeded to adopt a resolution and reaffirmed the prior regulation and to take further steps stating that they would not abide by such Opinion and that they would discourage and disapprove the use of school or educational personnel in and on the premises of private or nonpublic schools, even though the employment of such personnel was funded exclusively by the United States pursuant to the requirements of the Elementary and Secondary Education Act of 1965, Title I.

6. That the Defendants have willfully disregarded and ignored the requirements and mandate of the United States Laws and Regulations, as well as the assurances given by them to the United States Commissioner of Education, in that they have failed and refused to disapprove projects planned and contemplated pursuant to the Elementary and Secondary Education Act of 1965, Title I, which plans and projects are in violation of the lawful requirements for participation of those children attending private and nonpublic schools.

7. That the Defendants have willfully and in disregard of the requirements of the United States Laws and Regulations, and the assurances given by these Defendants to the United States Commissioner of Education, failed and refused to enforce the requirement that representatives of such children in private and nonpublic schools participate in the planning, development and evaluation of projects contemplated by the Elementary and Secondary Education Act of 1965, Title I.

8. That the Defendants have willfully failed to promulgate information and advice to the representatives of pupils and children in private and nonpublic schools, and to nonpublic school administrators, as well as local educational agencies, regarding the obligation of the Defend-

ants to provide for the participation of nonpublic and private school pupils in projects and plans enacted and rendered pursuant to the Elementary and Secondary Education Act of 1965, Title I.

9. That the Defendants have willfully, in violation of the Regulations and assurances set forth, failed to present to the United States Commissioner of Education, a disclosure of the statements and charges made by children and pupils of private and nonpublic schools through their representatives, and have failed and refused to submit a summary to the United States Commissioner of Education concerning the result of investigations made, and have willfully failed to make further investigations, although requested to do so by the pupils and children in private and nonpublic schools through their representatives.

10. That the acts of the Defendants herein were done and committed in bad faith, wrongfully, willfully, maliciously, intentionally and contrary to, and in spite of, competent opinion and advice.

11. That the monies and funds disbursed and distributed pursuant to the requirements of the Elementary and Secondary Education Act of 1965, Title I, to the Defendants from the United States, constitute a separate and special fund to be used fully and exclusively for the purposes set forth in the Act, and for the educational benefit of the Plaintiffs and all other such persons similarly situated; that thereby the Plaintiffs and all other educationally deprived children in the State of Missouri within economically deprived areas attending nonpublic and private schools are some of the beneficiaries of the trust necessarily created and constituted of such funds pursuant to the directive and requirements of the Elementary and Secondary Education Act of 1965, Title I.

12. That the Defendants are constituted the Trustees of such trusts, and as such have accepted the terms of the trust and have assured the United States Commissioner of Education that the State Board of Education and the local educational agencies have complied with the requirements and conditions of the trust as prescribed and set forth in the Elementary and Secondary Education Act of 1965, Title I, and the Regulations enacted pursuant thereto, and the Defendants have given assurances that the State Board of Education and local educational agencies have performed all of the obligations and conditions imposed upon them in connection with the performance of this trust, and Defendants have sought and received funds from the Commissioner of Education of the United States in reliance upon the assurances of the Defendants that they have and will comply with the terms, conditions and requirements of such trust.

13. That the Defendants have in fact and in truth failed and refused to comply with the requirements and conditions of the trust as set out and prescribed in the Elementary and Secondary Education Act of 1965, Title I, and have used and distributed such trust funds as were intended for the benefit of the Plaintiffs and for such other persons similarly situated in the State of Missouri, for uses and purposes other than for the benefit of the Plaintiffs, and such other unlawful and improper distributions and disbursements of said funds for other purposes and uses, constitute and render a breach of the trust and of the directive and conditions imposed by the Elementary and Secondary Education Act of 1965, Title I, and by the Federal Regulations enacted pursuant thereto.

14. That to date hereof, the Defendants have improperly and unlawfully distributed approximately \$13,000,000.00 in the method and manner pleaded herein.

WHEREFORE, the premises considered, Plaintiffs pray the decree and judgment of this Court:

(a) Requiring and directing the Defendants and each of them to account for the funds and monies received under Title I of the Elementary and Secondary Education Act of 1965, with a separate and exact accounting of the use of any of such monies or funds for the Plaintiffs and other children in private and nonpublic schools, and

(b) Ordering and directing the Defendants to render an accounting determining the amount of funds and monies wrongfully distributed and disbursed and not used for the benefit of the Plaintiffs and for such other persons as are similarly situated, and

(c) Ordering and directing the Defendants to restore such funds in the appropriate amount of \$13,000,000.00 to the State Board of Education, or to the substitute Trustee as prayed for herein, with a further direction that said funds be used exclusively for the purposes contemplated and stated in the Elementary and Secondary Education Act of 1965, Title I, for children enrolled in private and nonpublic schools, and

(d) Ordering and directing the Defendants to withhold the necessary amounts from further allocation of funds and monies of the United States which may be equal to the amount of any part of the approximately \$13,000,000.00 which is not recovered, as prayed for herein, and

(e) A Judgment of this Court appointing and establishing a substitute or alternate Trustee to administer the expenditure and disbursement of funds adjudged to be recovered prayed for herein, and of funds to be received in the future from the United States in amounts to be deter-

mined as being fair and equal in proportion to the number and need of educationally deprived children in attendance at nonpublic schools, and

(f) Entering Judgment for such other and further relief to these Plaintiffs as to the Court seems proper and required from time to time to adequately and completely carry out the mandates of the Judgment herein, and of the directives and requirements of the Act, and for Judgment for the Plaintiffs' costs incurred herein.

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Louis C. DeFeo, Jr.
1204 Elm Street
Jefferson City, Missouri
By /s/ Thomas M. Sullivan
Attorneys for Plaintiffs

ANSWER OF DEFENDANTS**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

[Title Omitted in Printing]

Come now the defendants, and for their joint and separate answer to plaintiffs' complaint:

COUNT ONE

1. Admit that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00, and that the plaintiffs rely upon the amendments and other authorities cited in Paragraph 1 of Count One of plaintiffs' complaint, but deny each and every other allegation contained therein.

2. Deny all of the allegations contained in Paragraph 2 of Count One of plaintiffs' complaint.

3. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 3, 4, 5 and 6 of Count One of plaintiffs' complaint.

4. Admit that all of the allegations contained in Paragraph 7 of Count One of plaintiffs' complaint were true at the time of the filing of said complaint, that defendant Hubert Wheeler is still a resident of Jefferson City, Missouri but deny all other allegations contained therein, defendant Hubert Wheeler having retired and been replaced as Commissioner of Education since April 6, 1970.

5. Admit that at the time of the filing of plaintiffs' complaint all of the allegations contained in Paragraph 8 of Count One thereof were true except that defendant Missouri State Board of Education has never itself been a member of the State Board of Education of the State of Missouri, but deny the applicability and truth of said allegations at this time, many of the said members of defendant State Board of Education having been replaced by new members since April 6, 1970.

6. Deny the allegations contained in Paragraph 9 of Count One of plaintiffs' complaint.

7. Admit that the Elementary and Secondary Education Act of 1965, Title I, is an Act and Statute of the Congress of the United States but deny each and every other allegation contained in Paragraph 10 of Count One of plaintiffs' complaint.

8. Admit the allegations contained in Paragraph 11 of Count One of plaintiffs' complaint.

9. Admit the allegations contained in Paragraph 12 of Count One of plaintiffs' complaint.

10. Admit that Section 116.19 of the Regulations established by the United States Commissioner of Education require that the needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them shall be determined, after consultation with persons knowledgeable of the needs of these private school children, but deny each and every other allegation contained in Paragraph 13 of Count One of plaintiffs' complaint.

11. Admit that Section 116.19 of the Regulations established by the United States Commissioner of Education

provide that public school personnel may be made available on other than public school facilities under certain circumstances, but deny each and every other allegation contained in Paragraph 14 of Count One of plaintiffs' complaint.

12. Admit the allegations contained in Paragraph 15 of Count One of plaintiffs' complaint.

13. Deny the allegations contained in Paragraph 16 of Count One of plaintiffs' complaint.

14. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of Count One of plaintiffs' complaint.

15. Admit that during their respective terms of office from the inception of the Elementary and Secondary Education Act of 1965 they have exercised their discretionary authority by refusing to make public school personnel available on other than public school facilities during regular school hours, but deny each and every other allegation contained in Paragraph 18 of Count One of plaintiffs' complaint.

16. Deny all of the allegations as contained in Paragraph 19 of Count One of plaintiff's complaint.

17. Admit that during their respective terms of office they refused and continued to refuse to accept or approve project applications under Title I, Elementary and Secondary Education Act of 1965, by local educational agencies which would include the use of Federally paid personnel on non-public school premises during regular school hours because there is no requirement whatsoever under said Act that requires the use of Federally paid personnel on non-public school premises, but deny each and every other allegation contained in Paragraph 20 of Count One of plaintiffs' complaint.

18. Deny all of the allegations contained in Paragraphs 21, 22, 23, 24, 25, 26 and 27 of Count One of plaintiffs' complaint.

19. State that Count One of plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be granted.

20. State that all actions taken by the defendants in administering the Elementary and Secondary Education Act of 1965 have periodically fully been reported to the United States Commissioner of Education as required by the Act. Moreover, the defendants' administration of the Act has been the subject of audit by the office of the U. S. Commissioner. At no time in connection with the matters complained of by the plaintiffs has the Commissioner or any other Federal officer expressed disapproval of the defendants' administration of the Act (other than a suggestion that equipment purchased with Federal funds has been permitted on occasion to remain on non-public premises longer than necessary, and that non-public school pupils were allowed to participate in Title I, ESEA projects who were not so educationally deprived as required of public school pupils). Accordingly, the plaintiffs' complaints which are the basis of the present suit should have been presented initially to the U. S. Commissioner and plaintiffs have therefore failed to exhaust available administrative remedies.

21. State that the Act accords wide discretion to State and local authorities in formulating plans under the Act. It does not require that publicly employed personnel be assigned to perform services on non-public premises. It is the judgment of the defendants that assignment of public employees to render services on premises owned and controlled by non-public institutions gives rise to serious administrative and educational problems which may impair

the effectiveness of the plans formulated pursuant to the Act. It is the judgment of the defendants that the purposes and objectives of the Act in respect to children attending non-public schools (and many children attending public schools) can most effectively be achieved by making services for these children available at convenient publicly controlled locations other than the schools regularly attended by them and at times other than regular school hours and by allocating mobile equipment acquired with Federal funds for use in the non-public schools as authorized by both the Act and the Regulations of the U. S. Commissioner. In the absence of an abuse of discretion, established by clear and convincing proof, the court will not interfere with the administrative judgment of agencies to whom Congress has assigned responsibility for administering the Act. No evidence of abuse of discretion on the part of defendants herein has been presented or exists.

21. State that all Title I, ESEA funds allotted to the State of Missouri are paid into the Missouri State Treasury. Payment is effected under a letter-of-credit system and the amount is equal to that expended by the State in carrying out its State plan. Such payments to the Missouri State Treasury may be made in installments, in advance or by way of reimbursement. All such funds so paid into the Missouri State Treasury are subject to the laws and control of the State of Missouri, and cannot be disbursed except in compliance with Missouri law, which prohibits disbursement for the use and employment of public school personnel on private and non-public premises.

22. State that the Constitution, laws and public policy of the State of Missouri, as expressed by both the legislature and the judiciary, forbid the assignment of public school teachers to serve in sectarian schools or the use of tax-raised funds to pay for such services. A national pro-

gram such as that of the ESEA, must as a matter of national policy and the principles of cooperative federalism, be interpreted and administered in such ways as to avoid confrontation with and the overriding of state law and policy. This national policy of avoidance of conflict is implicit in the ESEA, and the plans adopted and carried out by the State of Missouri, with the approval of the U. S. Commissioner, avoid the conflict while at the same time achieving the Congressional purposes.

23. State that a statute should be construed, if at all possible, in such a way as not only to avoid the necessity of declaring it unconstitutional, but also to avoid grave doubts as to its constitutionality. To construe the ESEA as requiring the assignment of personnel paid out of tax-raised funds to perform services in sectarian schools would raise grave constitutional doubts and should be avoided, particularly where, as in the present case, the Congressional objectives can be achieved by other means.

24. State that plaintiffs' complaint raises unsettled questions of Missouri State law which should first be decided in the Missouri State courts.

WHEREFORE, having fully answered, defendants jointly and severally pray to be discharged with their costs.

COUNT TWO

1. Re-state their answer to Count One of plaintiffs' complaint to the extent that it is relevant and incorporated in Count Two of said complaint.

2. Deny all of the allegations contained in Paragraphs 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Count Two of plaintiffs' complaint.

3. Admit that on January 29, 1970, the Attorney General of the State of Missouri issued his official Opinion No. 26 wherein he concluded that the Elementary and Secondary Act of 1965 provided that, under certain circumstances and to the extent necessary, public school personnel, paid with Federal funds pursuant to that program, might be made available on the premises of private schools to provide certain special services to eligible children and that Missouri law would not prevent public school personnel, paid with Federal funds, from providing those services on the premises of a private school, but deny each and every other allegation contained in Paragraph 5 of Count Two of plaintiffs' complaint. Defendants further state that said Attorney General's opinion is no more than it purports to be, a purely advisory opinion, which they are no more required to accept than any client is required to accept the advice of his attorney; that it did not spell out under what circumstances public school personnel paid with Federal funds could be made available on the premises of private schools, and, even if applicable, which defendants deny, it did not conclude that the furnishing of such personnel on private schools was mandatory.

4. State that in the complete absence of any requirement whatsoever that the defendants cause public school personnel to be made available for teaching services on private school premises and in the complete absence of any proof of defendants' abuse of their authority to exercise their discretion in administering the various programs offered by Title I of the Elementary and Secondary Act of 1965, plaintiffs have failed to state a claim upon which relief can be granted.

WHEREFORE, having fully answered, defendants jointly and severally pray to be discharged with their costs.

Respectfully submitted,

Kuraner, Dingman, Brockus, Kinton
& Lowe

By /s/ Harry D. Dingman
1111 City National Bank Building
Kansas City, Missouri 64106
221-3443

Attorneys for Defendants

Of Counsel:

Leo Pfeffer

15 East 84th Street
New York, New York 10028

PRETRIAL ORDER**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

[Title Omitted in Printing]

A pretrial conference was held in the Court's Chambers in Kansas City, Missouri on the 14th day of January, 1972. All attorneys were present and Commissioner Arthur Mallory was present at the invitation of the Court. The Court determined at this conference that it was desirable to separate the issues for trial in this case and set it for trial on Tuesday, February 22, 1972, at 9:30 a.m. on the sole issue of whether or not a permanent injunction should be entered in this case in favor of the plaintiffs and against the defendants as prayed for in the complaint.

At this trial the parties shall confine all their evidence to this sole issue and shall be limited in no way by this order in presenting other evidence at a later trial on any of the remaining issues.

From the previous discussions at the pretrial conferences, this Court believes that the primary issue to be decided by the Court in determining whether an injunction should be issued can be stated as follows:

Whether Title I, ESEA, and the Criteria established thereunder by the United States Commissioner of Education, requires that educational benefits provided by Title I be made available to educationally deprived children attending private schools on a basis that is equitable in quality, scope, and opportunity, to those available to educationally deprived children attending


public schools and that there must be an equitable sharing of educational resources provided by Title I so that the amount expended for each Title I project as to an educationally deprived child attending a private school be as nearly equal as possible to the amount so expended as to each educationally deprived child attending a public school.

Included in the issue so stated, and inherent therein, are the following related and subordinate questions:

(a) Are the defendants excused from complying with the requirements of Title I, ESEA, and the Criteria established thereunder by the United States Commissioner of Education, relating to the participation of educationally deprived children attending private schools, by reliance upon any interpretation of Missouri state constitutional provisions, statutes, regulations, or state court decisions?

(b) Is it lawful to make personnel, who are employed to implement Title I projects, available on private school premises during regular school hours in order to provide special services to educationally deprived children attending private schools?

/s/ William Collinson
District Judge



**ORDER DIRECTING THE ENTRY OF
A FINAL JUDGMENT**

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

[Title Omitted in Printing]

The Memorandum and Order filed in this case on June 2, 1972, denying plaintiffs' prayer for injunctive relief does not adjudicate all of the claims of the parties.

Plaintiffs' counsel has made a written request that the Court designate this order a final judgment under Rule 54(b) because the plaintiffs desire to appeal. The Court finds and determines that there is no just reason for delay in this matter and that the plaintiffs should be entitled to appeal from this order. The Court further finds that an appeal from this order will not delay the speedy adjudication of the other claims of the plaintiffs which have not yet been adjudicated.

For the above reasons, it is therefore

ORDERED that the Court's Memorandum and Order filed herein on June 2, 1972, shall be designated a final judgment as to plaintiffs' claims for injunctive relief; and

FURTHER ORDERED that the Clerk is hereby directed to enter a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. Defendants' counsel are directed to file a form of final judgment with the Clerk within five (5) days from this date.

/s/ Wm. R. Collinson
District Judge

JUDGMENT**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

[Title Omitted in Printing]

The sole issue of whether a permanent injunction should be entered in this case in favor of the plaintiffs and against the defendants, all as set forth in the pretrial order filed herein on January 18, 1972, came on for trial before the Court, Honorable William R. Collinson, District Judge, without a jury on February 22, 1972, and the Court having heard the evidence and having considered the arguments and statements of counsel, and the briefs and citations of authorities subsequently submitted, and a decision having been duly rendered,

It is Ordered and Adjudged that

(1) The plaintiffs' prayer for an injunction in this case is denied.

(2) The denial of plaintiffs' prayer for injunctive relief does not adjudicate other claims of the parties.

(3) There is no just reason for delay in this matter and the plaintiffs should be entitled to appeal from the Court's Memorandum and Order filed herein on June 2, 1972.

(4) The Court's Memorandum and Order filed herein on June 2, 1972, is designated as a final judgment as to plaintiffs' claims for injunctive relief and plaintiffs are entitled to appeal therefrom.

(5) That all costs of this action are taxed to the plaintiffs.

Dated at Kansas City, Missouri, this 12th day of June,
1972.

/s/ J. C. Truman
J. C. Truman
Clerk

ORDER

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543**

October 15, 1973

Leo Pfeffer, Esq.
15 East 84th Street
New York, N. Y. 10028

**RE: WHEELER ET AL. v. BARRERA
No. 73-62**

Dear Mr. Pfeffer:

The Court today took the following action in the above
case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time re-
quirements and procedures under the Rules.

The additional docketing fee of \$50, Rule 52(a) is due
and payable.

Very truly yours,

Michael Rodak, Jr., Clerk
By /s/ Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Encls.

Supreme Court of the United States

No. 73-62

Hubert Wheeler, et al.,

Petitioners,

v.

Anna Barrera, et al.

ORDER ALLOWING CERTIORARI. Filed **October 15**, 19 **73**.

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Eighth**Circuit is granted.

JUL 5 197

MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. **73-62**

HUBERT WHEELER, individually and in his capacity as former Commissioner of Education, State of Missouri, MISSOURI STATE BOARD OF EDUCATION, J. WARREN HEAD, DALE M. THOMPSON, MRS. TRUE DAVIS, JACK WEBSTER, ELSTON J. MELTON, W. CLIFTON BANTA, SIGNEY R. REDMOND, F. BURTON SAWYER, HARVEY B. YOUNG, JR., ELEANOR B. GRIFFITH, and ARTHUR B. MALLORY, present Commissioner of Education,
Petitioners,

VS.

ANNA BARRERA, individually and as Next Friend for JOANNA BARRERA, PATRICIA BARRERA, DIANA BARRERA, and MARIA BARRERA, minors, ODIS BROWN, individually and as Next Friend for RICHARD BROWN, a minor, BILLIE HAYES, individually and as Next Friend for ELAINE HAYES, EVELYN HAYES, GEORGE HAYES, BILLIE JOE HAYES, minors, GARRETT JONES, individually and as Next Friend for JANICE JONES, a minor, VINANCIO REA, individually and as Next Friend for ESTEBEN REA, a minor, PAUL ROJAS, individually and as Next Friend for YOLANDA ROJAS, MARIO ROJAS, KATRINA ROJAS, minors, PATRICIA WYATT, individually and as Next Friend for KEVIN WYATT, RAFAEL ZAPIEN, individually and as Next Friend for ANNA LISA ZAPIEN, REGINA ZAPIEN, HOPE ZAPIEN, RUBY ZAPIEN, minors,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

HUBERT WHEELER, individually and in his capacity as former Commissioner of Education, State of Missouri, MISSOURI STATE BOARD OF EDUCATION, J. WARREN HEAD, DALE M. THOMPSON, MRS. TRUE DAVIS, JACK WEBSTER, ELSTON J. MELTON, W. CLIFTON BANTA, SIGNEY R. REDMOND, F. BURTON SAWYER, HARVEY B. YOUNG, JR., ELEANOR B. GRIFFITH, and ARTHUR B. MALLORY, present Commissioner of Education,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The defendants herein petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on March 16, 1973, or in the alternative for a writ of certiorari under 28 U.S.C. Section 2101(e) to review the Order and Judgment of the United States District Court for the Western District of Missouri entered May 9, 1973 before judgment of the Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra* pp. A1-A38) is reported at 475 F. 2d 1338 (1973). The opinion of the District Court (Appendix B, *infra* pp. A39-A44) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix D, *infra* pp. A48-A49) was entered on March 16, 1973. The order of the Court of Appeals denying a timely petition for a rehearing (Appendix E, *infra* p. A50) was entered on April 11, 1973. The order and judgment of the District Court on remand (Appendix C, *infra* pp. A45-A47) was entered on May 9, 1973. The notice of appeal therefrom (Appendix F, *infra* pp. A51-A52) was filed in the District Court on June 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e). *Roe v. Wade*, U.S., 93 S. Ct. 705, 711 (1973).

QUESTIONS PRESENTED

1. Does the Elementary and Secondary School Act of 1965, 20 U.S.C. 241(e)(2), require that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours?

2. If the Act does so require, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?

STATUTE AND CONSTITUTIONAL AND REGULATORY PROVISION INVOLVED

Title I of the Elementary and Secondary Act of 1965,
20 U.S.C. 241 (e) provides in pertinent part:

“(a) A local educational agency may receive a grant under this title for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

(1) that payments under this part will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, * * * and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this part * * *;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *.”

The pertinent Regulations promulgated by the Commissioner of Education are set forth in footnotes 6 and 7 of the Court of Appeals opinion, *infra* pp. A6-A8.

The First Amendment to the United States Constitution provides, in pertinent part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

STATEMENT UNDER RULE 33(b)

This case draws into question the constitutionality of 20 U.S.C. 241(e) as construed by the Court of Appeals, and 28 U.S.C. 2403 may therefore be applicable. Neither the Court of Appeals nor the District Court has certified to the Attorney General the fact that the constitutionality of the Act was drawn into question, although the Attorney General on behalf of the Commissioner of Education, filed a brief *amicus curiae* in the Court of Appeals.

Copies of this petition for certiorari have been served upon the Solicitor General.

STATEMENT OF THE CASE

The respondents, parents of children attending religious schools, brought this class suit against the Missouri State Commissioner of Education and members of the State Board of Education, alleging that Title I services were being arbitrarily denied to children attending nonpublic schools in Missouri. Respondents prayed for an injunction and for an accounting of some \$13 million received and expended under the Act from 1966 through 1969. The District Court dismissed the complaint on the ground that the plaintiffs had failed to exhaust their administrative

remedies and that the Federal court should abstain from exercising jurisdiction since the case involved the unsettled question whether Missouri law forbade assignment of Title I funded teachers to serve in religious schools during regular school hours. The decision of the District Court was held by the Court of Appeals to be erroneous, and the case was remanded for trial. *Barrera v. Wheeler*, 441 F.2d 795.

On the trial the defendants conceded that they had refused to approve any plan or program for use of Title I funds which involved assigning teachers to perform their educational duties in church schools during regular school hours. They conceded also that in some school districts at some times less money was expended for Title I services actually utilized by children enrolled in church schools than for the same services utilized by children enrolled in public schools.

The defendants further argued that neither the Act nor the Regulations of the Commissioner of Education promulgated thereunder mandate the assigning of publicly employed teachers to serve in church schools during regular school hours, and to the extent that they may have authorized it they are unconstitutional under the Establishment Clause of the First Amendment.

The defense also contended that the disproportionate expenditure as between public and church schools, in the cases in which they did occur, resulted not from any malfeasance or bad faith on their part but exclusively from the refusal of the church school authorities to participate in or cooperate with any teaching program which did not involve the assignment of teachers to serve in the church schools during regular school hours, and that when the authorities did elect to participate and cooperate in after-hour or summer programs the amounts expended for church

school enrollees equalled or exceeded the amounts expended for public school enrollees.

The District Court found in the defendants' favor on both the law and the facts. On the law, the Court ruled that the Act did not mandate sending public school teachers into church schools, and if it did it "would raise serious questions as to the constitutionality of Title I." On the facts, it held that "the private school pupils could undoubtedly receive an equitable proportion of the funds through after-school and summer school instruction programs, if requested by the private school authorities" that there "is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds," and that "there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in nonpublic schools." (*Infra* p. A43)¹

Over the dissent of Judge Stephenson, who agreed with the District Court's conclusions, the Court of Appeals reversed and remanded the case to the District Court with

1. The District Court said:

"Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill. It is also clear that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs. In small school districts the furnishing of visual aids and mobile equipment could very easily furnish the equitable share of dollar aid.

"There is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds. Similarly, there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in the nonpublic schools."

directions to enjoin the defendants from further violation of the Act and to retain jurisdiction for the purpose of requiring the imposition and application of guide lines comporting with Title I and its regulations. (*Infra* pp. A29-A30)

On remand the District Court issued an injunction and judgment (*infra* p. A45) which provided in part:

1. Ordered and enjoined that when the needs of eligible children require it, special personnel services may be furnished under Title I by the public agency on private as well as public school premises, and further if such special personnel services are furnished public school children during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends. Defendants are enjoined from disapproving any application of a Local Educational Agency (LEA) for the grant of Federal Title I ESEA Funds on the basis that such application includes the use of Title I personnel on private school premises during regular school hours.

On June 6, 1972 petitioners' herein filed in the District Court a notice of appeal to the Court of Appeals from the said injunction and judgment. (Appendix F, *infra* p. A51)

REASONS FOR GRANTING THE WRIT

1. National Importance

The national importance of a definitive response to the questions raised in this case hardly needs extensive discussion. The amount of Federal funds available to the States under Title I of the Elementary and Secondary Act of 1965 is severely limited and most States, like Missouri, have found that one of the most efficient and economical ways of using these limited funds is to concentrate them on remedial reading and supportive services for children below average reading ability. (Appendix in Court of Appeals, Vol. III, 33-34.) On the other hand, with practical uniformity, State courts have ruled violative of State law the assignment of publicly employed teachers to perform educational services in church schools. *Special District v. Wheeler*, 408 S.W. 2d 60 (Mo., 1966); *State ex rel. Public School District v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932); *State ex rel. Chambers v. School District #10*, 155 Mont. 422, 472 P. 2d 1013 (1970); See also, *Americans United for Separation of Church and State v. Oakey*, 339 F. Supp. 545 (D.C. Vt. 1972).

Only this Court can determine definitively whether the Federal Act mandates the assignment of educational personnel to church schools notwithstanding contrary State law. This Court has not heretofore been called upon to pass upon this question. Moreover, as will be indicated hereafter, the United States Commissioner of Education has consistently taken the position that the Act contains no such compulsory mandate. Hence, the contrary determination by the Court of Appeals clearly calls for a resolution by this Court in the national interest.

Should this Court uphold the interpretation of the Act by the Court of Appeals it would be faced squarely with the question whether such a mandatory requirement, or indeed such a permissive provision, is consistent with the restrictions imposed upon both the Federal and State governments by the Establishment Clause of the First Amendment. Here too this Court has never passed directly upon this question and only it can provide a determinative answer.

2. Statutory Construction

As we have indicated (*supra* p. 6) the District Court upheld petitioners' contention that the Act "does not mandate the assignment of teachers paid by Title I funds to nonpublic schools."² Petitioners also contended that Missouri law forbade the assignment of Title I teachers to church schools, and that it was the intent of Congress not to require States to violate their own laws in order to qualify for Title I funds.

At first glance, the Court of Appeals appears to have agreed with that contention. It refers to "the legislative history of Title I which establishes that state policy and law shall govern the administration" of Title I programs. It adds that "Congress has emphatically declared in the act that federal control of programming, instruction and curriculum was prohibited, and the Commissioner of Education has continually recognized that the grants under Title I must accommodate state law." (*Infra* p. A21)

2. We are at a loss to understand the statement in the Court of Appeals opinion (*infra* pp. A16-A17) that "the Trial Court agreed with the defendants' contention that the Act does not permit the assignment of public school teachers to nonpublic schools." The defendants made no such contention nor did the Trial Court make any such ruling. Both the defendants and the Trial Court asserted only that the Act does not *mandate* such an assignment. It is, according to the defendants' view, the Constitution and not the Act which does not permit the assignment of public school teachers to nonpublic schools.

However, the Court of Appeals, notwithstanding its disclaimer (*infra* pp. A23-A24), immediately contradicted its concession by asserting in effect that the State of Missouri may not interpret its own law as barring assignment of Title I teachers to church schools. It seeks to reconcile what we believe to be a real contradiction as follows:

"This reasoning is not in conflict with the proposition that state law and policy must be accommodated under the administration of Title I. A state could conceivably pass a law that would prohibit the use of any Title I funds in a private school. Assuming such a law could overcome equal protection arguments, the net effect would be that the state could not comply with the Title I requirement that comparable services be administered to educationally disadvantaged non-public school children. Under those circumstances, the state would not be entitled to a Title I grant and would have to make the 'political' decision of whether to repeal the law or deprive all its educationally disadvantaged children of the economic benefits of the Act. . ." (475 F.2d 1338 at 1352)

The Court of Appeals concludes that "the Act demands that if . . . special services are furnished public school children, then comparable programs, if needed, must be provided the disadvantaged private school child." (*Infra* p. A25)

We do not disagree with the statement that comparable programs must be provided. What we challenge is the Court's conclusion that if Title I teachers are assigned to render special educational services within public schools during regular school hours the only comparable program would be the assigning Title I teachers to render the same services in private schools during regular school hours.¹

3. The District Court so interprets the opinion of the Court of Appeals. (*Supra* p. 6)

The only permissible alternative for the State is to bar any programs providing the assignment of Title I teachers to serve in any schools, public or private, during regular school hours.

This has been the contention of the plaintiffs but it finds no support in the text of the Act, in its legislative history,⁴ or in the regulations or guidelines of the Commissioner.⁵ The brief *amicus curiae* submitted to the

4. The Missouri situation was called to the attention of the Commissioner of Education as early as 1967. In response to a letter by Senator Edward V. Long of Missouri, the Assistant United States Commissioner of Education wrote to him on July 3, 1967 in part as follows:

This Office is well aware that certain types of arrangements involving private school children which may be legal in some States are not permitted under Missouri Law. *It should be noted, however, that Title I does not require that private school children be served through any particular type of arrangement.* What is required by sec. 116.19 of the regulations (enclosed) is that genuine opportunities be provided for the participation in Title I services by educationally deprived children attending private schools and that such opportunities be consistent with the number of such children and the nature and extent of their deprivation. (Record in Court of Appeals, Vol. VII, Ex. 7. Emphasis added.)

5. "Title I ESEA. Participation of Private School Children. A Handbook for State and Local Officials", pp. 19-20 (Def. Ex. 5 in Court of Appeals) reads as follows:

State Constitutions and Statutes

Many State departments of education found severe restrictions with respect to the kind of services that their respective State constitutions and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

*Dual enrollment may not be allowed.

*Public school personnel may not perform services on private school premises.

*Equipment may not be loaned for use on private school premises.

*Books may not be loaned for use on private school premises.

(Continued on following page)

Court of Appeals by the Commissioner makes no such claim. It could hardly have done so in view of the fact that the Act expressly states to the contrary. Section 241e(a)(2) designates "dual enrollment" as a special educational service or arrangement that would meet the statutory requirements. Dual enrollment is an arrangement for children in nonpublic schools to participate during regular school hours in specific courses given within the public schools. It requires the nonpublic school children to travel to the public schools and receive instruction there rather than requiring the public school teacher to travel to the private school for that purpose.

We concede that providing educational services to private school children on private school premises during

Footnote continued—

*Transportation may not be provided to private school students.

Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

When ESEA was passed in 1965, each State submitted an assurance to the U. S. Office of Education in which the State department of education stated its intention to comply with Title I and its regulations, and the State attorney general declared that the State Board of Education had the authority, under State law, to perform the duties and functions of Title I as required by the Federal law and its regulations. While State constitutions, laws, and their interpretations limit the options available to provide services to private school students, this fact, in itself, does not relieve the State educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the Federal law and regulations.

A number of school officials realized that they could not submit the required assurance because of the restrictions applying to private school students which were operative in their States. The impasse was successfully resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed programs.

Other States have proposed legislation which would allow the ESEA to administer Title I according to the Federal requirements. *Still others have applied the restrictions of the State to Title I and have relied upon the initiative of school administrators to develop a program that would meet the Federal requirements. (Emphasis added)*

regular school hours would be more convenient to them than providing the services after school hours. But it is no less true that requiring the private school children to travel what may be considerable distance to a public school during school hours to receive Title I services may be considerably more inconvenient to them. The Act, in referring to dual enrollment as a permissible means of fulfilling Title I requirements in respect to private school children, did not limit permissibility to dual enrollment programs but, using the term "such as", indicated that dual enrollment programs were merely an example of permissibility. If the inconvenience of dual enrollment does not render such programs non-comparable and hence impermissible, we cannot see how after hours services can be so held.

Our conclusion from the language of the Act, its legislative history and its interpretation and application by the Commissioner is that comparable does not mean identical. We submit that Congress recognized that respect to State law in effectuating the purposes of the Act might in some cases result in services to private school children which are less convenient than those accorded to public school children, but that Congress felt that this was a necessary and justifiable price for maintaining our traditional standards of federalism, particularly in the field of education.

We submit, therefore, that the Court of Appeals was in error in interpreting the Act as requiring Title I teachers to serve within private schools during regular school hours if the state assigns them to serve in public schools during those hours.

3. The Constitutional Issue

Since the District Court ruled that the statute does not require the assignment of Title I teachers to church schools it found it unnecessary to pass on the question

whether such assignment would violate the Establishment Clause of the First Amendment, although it recognized that if the statute did require it serious questions as to the constitutionality of Title I would thereby be raised. (*Infra* p. A44)

The majority of the Court of Appeals, although disagreeing with the District Court in its construction of the Act, also refrained from passing upon the constitutionality of any specific program which might be presented by a local educational agency. In his dissenting opinion, Judge Stephenson was of the view that the constitutional issue could not be avoided in the present posture of the case. (*Infra* p. A38)

We submit to the Court that Judge Stephenson is correct and that the constitutional issue is squarely before this Court at this time.

As we have indicated, the Title I services which were involved in this law suit are in the field of remedial reading. Remedial reading services are instructional services provided to below grade level students in order to bring them up to grade level and to assist them to perform at the grade level for their ages and potential. The Court of Appeals opinion refers to the situation at a parochial school with a student body largely of Mexican-American heritage who are confronted with a language problem which "must be overcome before they can ever be expected to understand and accomplish the prescribed studies for each grade. (*Infra* p. A15) The Court of Appeals cited this as an appropriate program under Title I.

It follows from this that the Court of Appeals necessarily ruled that publicly employed teachers can constitutionally be assigned to perform their instructional services in parochial schools.

We respectfully submit that instructional reading services by publicly employed personnel on church school premises during regular school hours cannot be constitutionally upheld in the light of *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971). In declaring unconstitutional Pennsylvania and Rhode Island statutes appropriating public funds to pay part of the salaries of teachers in parochial schools giving instruction in secular subjects, including reading, the Court said (403 U.S. at 618-19):

"We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that sec-

ular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal tenets and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." (403 U.S. at 619).

How can the State of Missouri make sure, as it must, that a Title I teacher assigned to serve in a religious school will remain "religiously neutral?" One way perhaps would be not to assign "a dedicated religious person" to teach "in a school affiliated with his or her faith and operated to inculcate its tenets." This, obviously, would be unlawful; it would violate Article VI of the Federal Constitution forbidding religious tests for public office; it would violate the Establishment and Free Exercise Clauses as interpreted by the Court in *Torcaso v. Watkins*, 367 U.S. 488 (1961); it would violate the Equal Protection Clause of the Fourteenth Amendment; and it would violate Title VII of the Civil Rights Act of 1964.

Another way would be to keep the teacher under constant and continuing surveillance, but this again is clearly the excessive entanglement which the Court in *Lemon* held to be constitutionally impermissible. It is no answer to say that the same surveillance might be required if the "dedicated religious person" paid with Title I funds taught in a public school. Aside from the fact that occasion and pressures to inculcate religious values in his or her teaching would be far less, is the more important point that even if this were not so, the Establishment Clause forbids entanglement of the state with religious institutions; it does not forbid entanglement with its own institutions. It is constitutional for the state to maintain surveillance and control over what goes on in public schools and what the teachers do there; it is not constitutional for it to maintain surveillance and control over what goes on in religious schools. That, the Court held in clear and unqualified terms, is excessive entanglement which violates the Establishment Clause.

Completely aside from the question of surveillance, both *Lemon* and *DiCenso* forbid "governmental grant programs [which] could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." We cannot see how public school personnel can be assigned to render educational services in religious schools without involving both church and state in sustained administrative relationships. A religious school does not cease to be a religious school when a public school teacher walks in. It remains under the control and direction of the religious authorities and the public school teacher must work out his or her operational relations with them on a continuing and day to day basis.

It does not matter whether the public school teacher is subject to the direction and control of the religious school principal while teaching in the school (which in

most cases he or she probably is) or simply acts together with the principal and the other nonpublic school personnel. The point is that there are continuing administrative relationships, as there must be in every case where public school teachers are assigned to teach in religious schools. This, we submit, is exactly the kind of entanglement of church and state which the Establishment Clause forbids.

The inescapable conclusion is that Title I teachers cannot constitutionally be assigned to religious schools to perform their educational services therein during regular school hours.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted, or in the alternative, that a writ of certiorari be granted to review the case before judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 72-1440

Anna Barrera, et al.,

Appellants,

v.

Hubert Wheeler, et al.,

Appellees.

} Appeal from the
United States Dis-
trict Court for the
Western District of
Missouri.

Submitted: January 9, 1973.

Filed: March 16, 1973.

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

We are presented on this appeal with significant questions relating to the lawful programming and proper allocation of funds to educationally deprived school children, both public and private, under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a-241m, 242-244 (1972).¹

¹ The declared purpose of Title I is "to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expend and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 241a (1972).

The plaintiffs, suing individually and on behalf of their minor children, are parents of educationally deprived children who attend non-public schools in the state of Missouri. This class suit was commenced on April 6, 1970, in the United States District Court for the Western District of Missouri against the State Commissioner of Education and the eight members of the Missouri Board of Education. The plaintiffs claim that Title I funds are being arbitrarily denied to non-public school children in Missouri. In seeking injunctive relief plaintiffs assert violations of the First and Fourteenth Amendments and a denial of their civil rights under 42 U.S.C. § 1983.

Plaintiffs originally prayed for an injunction restraining defendants from continued violations of the Act as well as for an accounting of misapplied funds totalling over \$13 million received and expended from 1966 through 1969. The trial court initially dismissed plaintiffs' action because of their alleged failure to exhaust administrative remedies and because it believed the federal court should abstain from exercising jurisdiction since the case involved unsettled questions of state law. This court held these findings to be erroneous and reversed and remanded the case to the district court for trial. *Barrera v. Wheeler*, 441 F.2d 795 (8 Cir. 1971). Upon remand of the case plaintiffs filed an application for preliminary injunction on October 12, 1971. In a pretrial order on January 18, 1972, the trial court ordered a separate trial as to issuance of the injunction and limited the issues as follows:

1. Whether Title I, ESEA, and the criteria established thereunder by the United States Commissioner of Education, requires that educational benefits provided by Title I be made available to educationally deprived children attending private schools on a basis

that is equitable in quality, scope and opportunity, to those available to educationally deprived children attending public schools and that there must be an equitable sharing of educational resources provided by Title I so that the amount expended for each Title I project as to an educationally deprived child attending a private school be as nearly equal as possible to the amount so expended as to each educationally deprived child attending a public school;

2. Whether the defendants may be excused from complying with the requirements of Title I, ESEA, and the criteria established thereunder by the United States Commissioner of Education, relating to the participation of educationally deprived children attending private schools, by reliance upon any interpretation of Missouri state constitutional provisions, statutes, regulations or state court decisions; and

3. Whether it is lawful to make public personnel, who are employed to implement Title I projects, available on private school premises during regular school hours in order to provide special services to educationally deprived children attending private schools.

Upon trial of those issues the district court, in an unpublished opinion, denied injunctive relief and held that whether Missouri state law "prohibits the use of *any* money" for teachers to be employed in private schools was not necessary to be decided in the case. The court concluded that although there undoubtedly has been inequitable expenditures of Title I funds between educationally deprived children in public and non-public schools in some local school districts, such inequity could be rectified by private school authorities requesting their "equi-

table share of dollar aid" for private school pupils to attend after-school and summer school instructional programs.²

We conclude that the district court's holding does not properly meet plaintiffs' lawful challenge and fails to properly interpret Title I in conformity with the Act's intended purpose. We reverse and remand with directions to grant certain equitable relief.

TITLE I AND ITS REGULATIONS

In 1965 Congress recognized that there were over five million children living in families whose income was less than \$2,000 a year.³ The adverse poverty of these children was found to lead directly to educational neglect resulting oftentimes in human frustration, delinquency and crime. Congress further realized that the impact of poverty and financial hardship was not confined solely to public school children. Consequently, when Title I was drafted Congress expressly required the inclusion of non-public school children by conditioning any grant upon the proviso that:

² The trial court further found:

"Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill. It is also clear that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs. In small school districts the furnishing of visual aids and mobile equipment could very easily furnish the equitable share of dollar aid.

"There is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds. Similarly, there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in the nonpublic school."

³ It has recently been projected that with the raising of the income ceiling there are now over 20 million children qualified under Title I. See note 12 *infra*.

"[T]o the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate" 20 U.S.C. § 241c(a)(2) (1972).

The Act made it the strict responsibility of the local educational agency to plan and administer programs that would meet the particularized needs of all educationally disadvantaged children.⁴ Thus, the undisputed purpose of Title I was to benefit the educationally deprived child whether attending a public or a non-public school.⁵

⁴ The present statute, 20 U.S.C. § 241c, reads in part:

"(a) A local educational agency may receive a grant under this part for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

"(1) that payments under this part will be used for programs and projects (including the acquisition of equipment, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs"

The procedure for determining the funds payable to a local school district includes both public and private school children and is presently calculated according to the following formula:

$a/2 \times b$ = Dollars payable to local school district

a = Average expenditure per pupil in the state

b = Number of children age 5-17 coming from families with annual incomes of less than \$3,000 (\$4,000 for fiscal year ending June 30, 1973).

See 20 U.S.C. § 241c (1972); H.R.Rep. No. 143, 89th Cong., 1st Sess. 3 (1965).

⁵ As both the Senate and House Reports state, the Act anticipates "broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary school students who are not enrolled

Upon passage of the Act the United States Commissioner of Education provided by detailed regulation that educationally deprived children in private schools be afforded "genuine opportunities" to participate in Title I programs "comparable" to the programs available in public schools.⁶ In March, 1968, the Commissioner set out revised criteria for the approval of Title I applications based upon the law and the existing regulations which stated:

"The applicant's assessment of needs of children at various grade and age levels must include the children in the eligible public school attendance areas who are enrolled in private schools. This assessment is to be carried out in consultation with private school authorities and to provide the basis for (a) deter-

in public schools." S.Rep. No. 146, 89th Cong., 1st Sess. 12 (1965). See also H.R.Rep. No. 143, 89th Cong., 1st Sess. 7 (1965). This "child benefit theory" was, therefore, one of the basic premises supporting the enactment of Title I. See generally 111 Cong.Rec. 5743, 5756-5758, 7309 (1965) (remarks of Representatives Perkins and Carey and Senator Morse). Similarly Title II of the ESEA provides all school children with text books and other instructional services and materials. Other provisions of the Act, Titles III, IV and V, provide direct aid to public school authorities for model programs, for research and for grants designed to strengthen the state departments of education.

⁶ Section 116.19 of the regulations states in part:

"(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such arrangements as dual enrollment, educational radio and television, and mobile educational services and equipment. . . .

"(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.

"(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local

mining the special services in which private school children will have genuine opportunities to participate, and (b) selecting the private school children for whom such services are to be provided.

"The needs of private school children in the eligible areas may require different services and activities. *Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority.* 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." Commission of Education, Title I Program Guide No. 44, 4.5 (1968).⁷ (Emphasis ours.)

educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. . . .

"(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

"(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and only when such services are not normally provided by the private school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. . . . Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities." 45 C.F.R. § 116.19 (1972).

⁷ This guideline is presumably based in part on Section 116.18(a) of the regulations which reads:

"(α) Each application by a State or local educational agency for a grant (other than one for a planning project) must propose projects

We think it clear that the Act and the regulations require a program for educationally deprived non-public school children that is comparable in quality, scope and opportunity, which may or may not necessarily be equal in dollar expenditures to that provided in the public schools. Although the district court originally phrased the issue in terms of "quality, scope and opportunity," it nevertheless based its opinion on an "equitable" funds standard. We, therefore, find the district court's ruling to be erroneous in holding that the use of Title I funds by the Missouri Board of Education meets proper standards and find that plaintiffs are entitled to equitable relief.

TITLE I IN MISSOURI

In the Kansas City, Missouri, school district where the plaintiffs reside, approximately 11,000 elementary and secondary students are eligible for Title I programs. Because of the limited funding and the wide disbursement of children, only about 7,000 public school pupils were enrolled in Title I programs. The number of educationally disadvantaged children in the five principal private schools in Kansas City was estimated at 355 (4.72 per cent of the 7,000 public school pupils receiving aid). These figures for the non-public schools are only estimates because (1) the income and personal records of private school parents were not readily available to the public schools; (2) the non-public schools were not centrally organized and had

of sufficient size, scope and quality as to give reasonable promise of substantial progress toward meeting the needs of educationally deprived children for whom the projects are intended." 45 C.F.R. § 116.18(a) (1972).

See also 20 U.S.C. § 241e(a)(1) (1972); 45 C.F.R. § 116.19 (1972).

to be dealt with separately; and (3) the public and non-public school officials notoriously failed to cooperate among themselves.

Almost the entire Title I program in Kansas City is devoted to remedial reading taught in the public schools during the regular school day for disadvantaged public school children only. Outside of equipment and materials provided to the private schools, the one program available under public school auspices for educationally disadvantaged non-public school children was a summer school remedial reading class. In the summer of 1971 approximately 112 private school children and 2,500 public school children participated. With this experience both the public school and private school officials admitted at trial that summer school was a poor substitute for regular day school classes.

The Kansas City public schools have set a \$250 per pupil guideline for Title I assistance which under present funding would allow for approximately 8,050 participants. The largest share of the Title I appropriations (approximately 65 per cent) is spent on teachers and teacher aids. About twenty teachers and 130 to 150 teacher aids are presently employed in eighteen elementary and four secondary schools in Kansas City. On several occasions in recent years the non-public schools have requested teachers and teacher aids to come to the private school and teach special remedial classes during part of the regular school day. All such requests have been denied by the public school officials, and the private schools have not, as yet, requested any other assistance except equipment and materials. As a consequence the disparity in Kansas City between expenditures for private and public school children in Title I has been \$50 as compared to \$275. Recently

the public school officials have given the non-public school children their "equitable" share of funds all in monies for equipment and materials.

The practice in Missouri as a whole in prior years has been to give comparable equipment, materials and supplies to eligible private school children, but to exclude any sharing whatsoever of personnel services. Most Title I public school programs in Missouri involve remedial reading, speech therapy and special mathematics classes, thus the largest proportion of the cost of these projects involves salaries for teachers and teacher aids. After the first two years of Title I, expenditures in Missouri for instructional personnel have run from 65 per cent to 70 per cent of the total grant. The remaining funds are used for equipment and materials, health and counseling services, transportation, and plant maintenance. One difficulty with providing only equipment and materials is that even minimal sharing of expenses for equipment and materials soon reaches a saturation point; in fact, the state guidelines permit only 15 per cent of any appropriation to be spent on equipment and instructional materials. The result of this plan for the deprived private school child has been to create a disparity in expenditures in many school districts ranging from approximately \$10 to \$85 approved for the educationally disadvantaged private school child to approximately \$210 to \$275 allocated for the deprived public school child.⁸ From the facts presented the trial

⁸ Title I programming within Missouri school districts flagrantly breaches the state commissioner's own statement of policy as revised in March of 1971 which reads in part (emphasis their own):

"The following procedure should be used in determining the private school participation in Title I activities:

- "1. Determine the special educational needs of all educationally deprived children residing in eligible Title I attendance areas in the public school district. At least one objective measure

All

court itself recognized that Missouri's "interpretation of Title I has resulted in an undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic schools in some local school districts in the state."

A few school districts in Missouri have attempted to remedy this disparity by providing, in addition to the projects conducted during regular school hours for deprived public school children, Title I programs in the public schools which are open to all educationally deprived children after regular school hours and in the summer. The opinion held by most educators was that these programs were not nearly as successful as the programs conducted during the regular school hours for public school children. The evaluation specialist of the Kansas City School District, Edmund Downey, and the principal of a parochial school in Kansas City, Sister Agnes Marie

ment must be used in making this determination. Subjective measurements may also be used.

"2. Determine the most pressing special educational needs of all educationally deprived children residing in eligible Title I attendance areas in the school districts. . . .

"3. Develop a program that will meet the most pressing special educational needs of all educationally deprived children residing in the school district. This is the responsibility of the local public school district after consultation with persons knowledgeable of the needs of the private school pupils. The same level of educational deprivation should be used for determining eligible private school children as is used for determining eligible public school children.

"4. Determine the extent of pupil participation in the Title I, ESEA, program that Title I, ESEA, funds will allow. Private school pupils are entitled to receive the same consideration as public school pupils. This does not mean that private school pupils will necessarily engage in the same activities as public school pupils. Title I Federal Regulations and Missouri State Law restrict the activities for which Title I funds may be expended.

"5. Services for private school pupils participating in the Title I program must be comparable in quality and scope to those provided public school pupils participating in the program if

Hagen, testified that in their opinion, even with these attempts at giving assistance, disadvantaged non-public school children in Kansas City were not receiving comparable educational services under Title I.⁹

COMPARABILITY

There are practical as well as legal considerations when assessing the qualitative scope of a "comparable" Title I program for deprived private school children. For example, in Kansas City the estimated 355 non-public school students who qualify for aid under Title I are scattered throughout five elementary and secondary schools. Obviously the same type of remedial help cannot be programmed for an extremely small number of needy children located in a private school as can be instituted in a public school where a large number of children may be reached.

the nature and extent of educational deprivation and the special educational needs are the same.

"9. Title I, ESEA, funds must be used to supplement and not supplant private school funds.

"11. Projects conducted in private schools must be of sufficient size, scope and quality.

"12. The average cost per pupil enrolled in a private school and participating in a Title I, ESEA, program and the average cost per pupil enrolled in a public school and participating in a Title I, ESEA, program will be used as a guide in making State Department of Education approval. If the variance is greater than 10 per cent (more or less) justification will be requested before making approval." Missouri Department of Education, Policy No. 2, Participation of Private School Children in Title I Activities (1971).

The variance in average cost per pupil for public and private Title I recipients in Missouri far exceeds the state's own 10 per cent guidelines.

⁹ The Missouri State Coordinator of the Elementary and Secondary Education Act referred in his testimony to a letter Missouri received from the United States Commissioner of Education informing the state that the St. Louis, Kansas City and Cape Girardeau programs did not comply with the regulations regarding the participation of private school children in Title I projects.

Furthermore, there are many Title I programs which can be utilized in public schools which would not be constitutionally permissible on private school premises. For example, using Title I funds to reduce the general pupil-teacher ratio is permissible in a public school within a low-income area but constitutionally impermissible in a similarly situated private school. However, this concern misses the Congressional mark since Title I programming contemplates for the private pupil only "*special* educational services and arrangements . . . in which such children can participate."¹⁰ Thus, comparability in size, scope and opportunity cannot necessarily be measured in terms of total similarity. It is only in the area of "*special* . . . services" where the program need be comparable, provided it is determined by the local educational agency that the needs of the children are similar. Furthermore, it is inaccurate to attempt to equate Title I programs on a

¹⁰ 20 U.S.C. § 241c(a) (2) (1972) (Emphasis ours). See the remarks of Representatives Carey and Perkins, the manager of the House Bill, during House debates where they emphasize the importance of the word "*special*:"

"Mr. GOODELL . . . If the public school officials with Federal money wish to put a public school teacher in a private school to teach any subject, I would like to have a clear legislative history as to whether it is permitted in this bill.

"Mr. CAREY. If the gentleman phrases his question 'any subject,' the answer would be 'No,' because that would include all subjects.

"Mr. GOODELL. What subjects then would be permitted?

"Mr. CAREY. 'Special' is the key word. The gentleman knows that the word 'special' is in the bill. These are special instructional services. Those that are special are not general. . . . What is special would be determined by pedagogy.

"Mr. GOODELL. . . . I would like to ask the gentleman from Kentucky if that is his answer, just as a matter of getting the legislative history.

"Mr. PERKINS. The gentleman has answered the question very clearly.

"Mr. PERKINS. My answer is no as to providing any teaching services to a private institution. The key here is the extension of special educational services to deprived children under public auspices and arranged for supervised and controlled by public authority."

111 Cong.Rec. 5747-5748 (1965).

"fair-sharing" basis which requires an equivalent pro-rata distribution of funds among public and private school students. Fair-sharing of funds is not the intent of Title I.¹¹ When appraising what is equitable and comparable, the dollar amount allocated can serve only as an indicia of compliance or noncompliance. In fact, recent federal guidelines allow a greater amount of Title I funds to be spent on school areas with higher concentrations of children from low-income families in order to obtain the maximum effect.¹²

The grant of Title I funds is based solely upon the "need . . . determined" of the individual child. Con-

¹¹ In 1969, the National Advisory Council on the Education of Disadvantaged Children, which reports to the President and Congress each year on the progress of Title I, found:

"[S]ome of the nonpublic school officials interviewed, unhappy at the relatively low level of participation by disadvantaged pupils enrolled in their schools, spoke repeatedly of not receiving their 'fair share' of the city's Title I funds; occasionally they mentioned a 'fair share' percentage coinciding with the percentage of nonpublic school children in the city. Of course, the law intends no such 'sharing' or division of funds. Further, the number of disadvantaged nonpublic school children was not proportionate to the number of disadvantaged public school children in any city in the present study. The phrase 'fair share' as used above may be convenient shorthand, but such usage is inconsistent with the intent of the law." National Advisory Council on the Education of Disadvantaged Children, Annual Report to the President and the Congress 38 (1969).

¹² As the National Advisory Council on the Education of Disadvantaged Children stated in its letter to the President and the Congress on March 31, 1972:

"The Council notes that title I is now serving 7.5 million disadvantaged children, 1.5 million fewer than in 1969. This decrease is due to the concentration guideline, which directs Local Education Agencies (LEA's) to spend more on fewer children for maximum impact.

"The most recent study which records the number of children living in school attendance areas with high concentrations of children from low-income families (the determining factor of eligibility for title I service) states that 20 million children are living in these attendance areas.

"This would suggest that approximately two-thirds of the children needing the extra services of compensatory education are not receiving title I services. The Council asks that you carefully consider this fact, and that neither the Executive nor the Legislative Branch of the Federal Government view with complacency the need to serve additional disadvantaged children." National Advisory Council on the Education of Disadvantaged Children, Annual Report to the President and the Congress iii (1972).

sequently some children may require speech therapy or special instruction in the English language¹³ whereas others may demonstrate no particular need at all. This need factor may vary between educationally disadvantaged public school children as well as between deprived public and private school children.¹⁴

The analysis of whether the program within the private school is comparable to the public school program lends itself more to the definition of what is not comparable rather than what is.¹⁵ It is not a comparable program where the need for remedial services of the educationally deprived private school pupil is at least equal to that of the educationally deprived public school student and the only service provided to the private school child is the furnishing of equipment. It is not a comparable program to provide only after-hour and summer remedial instruction on neutral sites which are open to the needy private school child while offering the same services during regular school hours for deprived public school pupils, especially when the partial expense for transportation must be borne by the private school child who comes from a low-income

¹³ The record discloses that Our Lady of the Americas school, a parochial school in Kansas City, has a student body that is 98 per cent Mexican-American with approximately 175 students eligible for Title I. These children are confronted with a language and cultural problem which must be overcome before they can ever be expected to understand and accomplish the prescribed studies for each grade. A program designed to meet the needs of these eligible non-public school students might necessarily require a different focus of attention resulting in less or even greater expenditures.

¹⁴ Disparate allocations of funds may arise because the concentration of eligible children is frequently confined to certain geographic areas. Furthermore, the needs of qualified students may differ because of nationality or cultural backgrounds or because the local school district already has provided effective remedial aid to needy children. Sometimes disparity in allocation may arise where the local agency has failed to request sufficient funds or the private or public school has failed adequately to evaluate or report the eligible children and their needs.

¹⁵ The late Professor Cahn wrote that justice is best defined by considering what injustice is. Cahn, *Confronting Injustice* 10 (1966).

family.¹⁶ Of equal or greater significance is the fact that educational authorities believe such programs do not provide equivalent benefits nor do they successfully reach a significant number of the eligible students. Once the need of *all* qualified students is determined, the state or local educational agency must then show some reasonable justification, within the defined purposes of the regulations and the Act, for denying comparable services to eligible private school pupils. No showing has been made here.

APPLICABILITY OF STATE LAW UNDER TITLE I

The gross justification presented by the defendants for the dissimilarity of programs under Title I is that Missouri state law does not allow any shared or dual-time programs whereby the non-public school student can be brought into the public school during regular school hours to receive specialized instruction. Furthermore, the defendants argue that Missouri constitutional law, as well as the Constitution of the United States, prohibit the use of public teachers on private school premises. The defendants urge additionally that Title I does not contemplate the assignment of Title I teachers to non-public schools during the regular school hours. It is, therefore, contended that the only means by which non-public school students can receive teacher services under Title I is through the operation of some after-hour and summer instructional training.

The trial court agreed with the defendants' contention that the Act does not permit the assignment of public

¹⁶ The Missouri Constitution prevents the use of state funds for busing non-public school children, at least to the extent they are transported to and from the private school. See *McFey v. Harkins*, 258 S.W.2d 927 (Mo. 1953). This objection cannot apply to children transported under Title I funds for instructional training. See discussion, *infra* at 26-29.

school teachers to non-public schools. Presumably the court's conclusion was drawn from the Senate House Reports which declare that the Act does not authorize funds for the payment of private school teachers. See S.Rep. No. 146, 89th Cong., 1st Sess. 11 (1965); H.R.Rep. No. 143, 89th Cong., 1st Sess. 7 (1965). However, plaintiffs make no claim that Title I funds should be paid to private school teachers nor do they argue that public school teachers should be assigned to non-public schools for the teaching of general secular classes. They readily concede that such an application of Title I funds would be a violation of the First Amendment. See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Americans United for Separation of Church and State v. Oakey*, 339 F.Supp. 545 (D.Vt. 1972); cf. *Wolman v. Essex*, 342 F.Supp. 399 (S.D.Ohio 1972), aff'd, 93 S.Ct. 61 (1972); *Johnson v. Sanders*, 319 F.Supp. 421 (D.Conn. 1970), aff'd, 403 U.S. 955 (1971). And, of course, Title I must be read as comporting with constitutional requirements. See generally *Communications Assn. v. Douds*, 339 U.S. 382, 407 (1950); *United States v. C.I.O.*, 335 U.S. 106, 120-121 (1948); cf. *Singer Sewing Machine Company v. Brickell*, 233 U.S. 304, 313 (1914); *Port Construction Co. v. Government of the Virgin Islands*, 359 F.2d 663 (3 Cir. 1966). The district court overlooks, however, that the Senate Report does consider the use of public school teachers in the private school for restricted purposes:

"It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally pro-

vided by the nonpublic school." S.Rep. No. 146, 89th Cong., 1st Sess. 12 (1965).

The Senate and House debates also demonstrate that this limited use of public school teachers for specialized services was foreseen and intended by the managers of the Bill. 111 Cong. Rec. 5746-5748, 5758, 5979, 7309 (1965). Therefore, we find the district court's interpretation of Title I as involving a broad proscription of public teacher services in the private schools to be in error.

We come then to defendants' contention that this use of public school teachers in private schools is in violation of Missouri state law. In *Special District v. Wheeler*, 408 S.W.2d 60 (1966) (Judges Finch and Hyde dissenting on the dual-time holding), the Missouri Supreme Court specifically banned dual-time as a means of carrying out joint instructional programs for public and non-public school children.¹⁷ The court held that the Missouri compulsory attendance law requires each child to remain in his regularly assigned school for a minimum of six hours.¹⁸ In the *Wheeler* case the Missouri Supreme Court was also faced with the practice of public school teachers providing speech therapy for non-public school children on the private school premises. The Missouri court found this practice violated the Missouri Constitution by using public school funds for the education of private school pupils

¹⁷ Compare *State ex rel. School District v. Nebraska State Board of Education*, 195 N.W.2d 161 (Neb. 1972), cert. denied, 93 S.Ct. 220 (1972) (see opinions of Justices Douglas and Brennan in denial of certiorari).

¹⁸ In the states where dual enrollment programs have been conducted, the United States Commissioner of Education has found that teacher services are provided under Title I in a comparable and equitable manner. Title I specifically offers this method as one of the alternatives for complying with the Act, 20 U.S.C. § 241e(a)(2), and as the Commissioner has pointed out, this is one of the most feasible ways to achieve compliance. See generally La Noue, *Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities*, 22 Rutgers L. Rev. 219, 252 (1968).

in derogation of the constitutional requirement that public funds "belonging to or donated to any state fund for public school purposes" be used for "establishing and maintaining free public schools, and for no other uses or purposes whatsoever." Mo.Const. art. IX, § 5.¹⁹ Thus, dual enrollment is presently unlawful in Missouri by statutory interpretation and the use of "public monies" for sending public teachers into private schools for specialized instruction has been forbidden by state constitutional provisions.

After the *Wheeler* decision the Missouri State Board of Education promulgated two regulations relating to programs to be administered by local agencies under Title I. They read as follows:

(a) ". . . . Therefore, shared time or dual enrollment between public and nonpublic schools would not be in conformity with state law. Programs operated in the public school for all children after regular school hours, on Saturday, and during the summer after close of the regular school term would be in conformity with state law."

(b) "Special educational services and arrangements, including broadened instructional offerings made available to children in private schools, shall be provided at public facilities. Public school personnel shall not be made available in private facilities. This does not prevent the inclusion in a project of special educational arrangements to provide educational radio and television to students at private schools."

The state board has interpreted the proscription of public monies in the Missouri Constitution under the *Wheeler* decision and has thus concluded that Title I funds are also state public funds to be similarly proscribed. As a result

¹⁹ See also Mo. Const. art. I, § 7; art. IX, § 8.

of the board's regulations the local school districts have denied requests of non-public schools for the services of public school teachers in providing remedial training to their educationally disadvantaged children.

Although dual enrollment has been precluded under Missouri law, except for the state board's regulations, the crucial question of whether the Missouri Constitution prohibits the use of *all* funds, regardless of the source, for sending public school teachers into the private schools for specialized programs has not been decided. The Missouri Attorney General for one has publicly disagreed with the State Board of Education's interpretation of the law.²⁰

Plaintiffs discount the applicability of state law by asserting that since Title I is a federal act and since there exists a conflict between federal and state law, the supremacy requirements dictate that federal law controls, citing

²⁰ In an opinion written in January, 1970, the Missouri Attorney General stated:

"[F]ederal funds, not state funds or State Public School Fund moneys, will pay the teachers for services rendered in making certain services under the Title I Program available on the premises of a private school. The essential character of these funds is not changed from federal to state funds by the mere fact that the Missouri Legislature 'appropriates' them to the State Board of Education. The appropriation comes neither from 'General Revenue' (see for instance § 2.060, House Bill No. 2, Seventy-fifth General Assembly) nor from the 'State School Moneys Fund' (see for instance § 2.200, House Bill No. 2, Seventy-fifth General Assembly). These funds are appropriated on an open end basis from 'Federal Funds.'

"We do not believe that an appropriation of this type converts federal aid into state aid, thereby making it subject to the Missouri constitutional provisions referred to above.

"It is the opinion of this office that the Elementary and Secondary Education Act of 1965 provides that, under certain circumstances and to the extent necessary, public school personnel, paid with federal funds pursuant to this program, may be made available on the premises of private schools to provide certain special services to eligible children and that Missouri law would not prevent public school personnel, paid with federal funds, from providing these services on the premises of a private school." Op. Att'y Gen. No. 26, 7-9 (1970).

See also *In Re Proposal C*, 185 N.W.2d 9, 22-24 (Mich. 1971).

Townsend v. Swank, 404 U.S. 282, 286 (1971); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Brown & Bartlett v. United States*, 330 F.2d 692 (6 Cir. 1964); *Matcovich v. Anglim*, 134 F.2d 834 (9 Cir. 1943). This approach, however, substantially ignores the legislative history of Title I which establishes that state policy and law shall govern the administration of these programs.²¹ Moreover, Congress has emphatically declared in the act that federal control of programming, instruction and curriculum was prohibited,²² and the Commissioner of Education has continually recognized that the grants under Title I must accommodate state law.²³

Although state law is to be accommodated, the issue of whether Title I funds are state monies or federal funds must necessarily be decided by federal law. Cf. *United States v. 93,970 Acres*, 360 U.S. 328, 332-333 (1959), and cases cited therein; *Enochs v. Smith*, 359 F.2d 924, 926 (5 Cir. 1966). Directly involved here is the interpretation of the funding process under a federal act. The Act itself makes it readily apparent that Title I appropria-

²¹ 111 Cong.Rec. 5743-5744, 5746, 5757-5758, 5979, 7623. See also Hearings on S. 370 Before the Subcomm. on Education of the Senate Comm. on Labor & Public Welfare, 89th Cong., 1st Sess., pt. 1, at 516, 518 (1965).

²² Section 604 of the ESEA, Pub. L. No. 89-10, 79 Stat. 27, 57 (April 11, 1965), states:

"Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system."

See 20 U.S.C. § 242(a).

²³ The Commissioner of Education's Handbook for State and Local School Officials sets forth the following discourse:

"State Constitutions and Statutes

"Many State departments of education found severe restrictions with respect to the kind of services that their respective State constitutions

tions are a federal grant made *in trust* to local school agencies within a state for the direct benefit of the educationally disadvantaged child. 20 U.S.C. §§ 241e, f, g (1972). The funds are not to be commingled with other "public funds" (45 C.F.R. § 116.24), and they are not to supplement funds that are already used for educational purposes in the state. 20 U.S.C. § 241c(e), 241g(c) (1972). See also 111 Cong.Rec. 5734, 7299 (1965) (remarks of Representative Perkins and Senator Morse). The *only* control the state board has over such funds is to channel them to the local agencies and to review the programs of the local educational agencies to make certain the programs are consistent with the Act and the Commissioner's regulations. A state cannot pass a law or interpret its own laws to say that a Title I grant is to be considered state funds or public funds for the maintenance of free schools. To do so would be to violate the spirit and the

and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

"The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

- *Dual enrollment may not be allowed.
- *Public school personnel may not perform services on private school premises.
- *Equipment may not be loaned for use on private school premises.
- *Books may not be loaned for use on private school premises.
- *Transportation may not be provided to private school students.

Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

"When ESEA was passed in 1965, each State submitted an assurance to the U. S. Office of Education in which the State department of education stated its intention to comply with Title I and its regulations, and the State attorney general declared that the State board of education had the authority, under State law, to perform the duties and functions of Title I as required by the Federal law and its regulations. While State constitutions, laws, and their interpretations limit the options available to provide services to private school students, this fact, in itself, does not relieve the State educational agency of its responsi-

letter of Title I. It seems clear that Title I, as involved herein, does not provide any state aid or any school aid to the state²⁴—it is an act to provide educational services to those who qualify under the Act as educationally disadvantaged children.

This reasoning is not in conflict with the proposition that state law and policy must be accommodated under the administration of Title I. A state could conceivably pass a law that would prohibit the use of *any* Title I funds in a private school. Assuming such a law could overcome equal protection arguments,²⁵ the net effect would be that the state could not comply with the Title I requirement that comparable services be administered to educationally disadvantaged non-public school children. Under those circumstances, the state would not be entitled to a Title I grant and would have to make the "political" decision of whether to repeal the law or deprive all its educationally

bility to approve only those Title I applications which meet the requirements set forth in the Federal law and regulations.

"A number of school officials realized that they could not submit the required assurance because of the restrictions applying to private school students which were operative in their States. The impasse was successfully resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed programs. [New York]

"Other States have proposed legislation which would allow the SEA to administer Title I according to the Federal requirements. Still others have applied the restrictions of the State to Title I and have relied upon the initiative of school administrators to develop a program that would meet the Federal requirements." HEW, Office of Education, Title I ESEA Participation of Private School Children, A Handbook for State and Local School Officials pt. III, at 19-20 (1971) [hereinafter cited as Office of Education Handbook].

²⁴ Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 711-721 (1964 ed. & Supp. V), does provide direct aid for construction of buildings and facilities at church-related colleges. This section has been held constitutional. *Tilton v. Richardson*, 403 U.S. 672 (1971).

²⁵ Cf. *In Re Proposal C*, 185 N.W.2d at 27-30.

disadvantaged children of the economic benefits of the Act. Cf. *Rosado v. Wyman*, 397 U.S. 397, 420-423 (1970).²⁶

We conclude that although the administration of Title I must accommodate state law, Title I funds are federal funds with which state and local educational agencies cannot lawfully provide services for eligible public school children and at the same time deny comparable programs to eligible private school children by simply commingling such funds with proscribed state "public funds." More apropos to our discussion here is the provision within the Missouri Constitution which reads:

"Money or property may also be received from the United States and be redistributed *together with public money of this State* for any public purpose designated by the United States." Mo. Const., art. III, § 38(a). (Emphasis ours.)

²⁶ It would seem axiomatic that programming in the use of Title I funds must comply with the Act and be consistent with the Commissioner's regulations. The statute makes this clear. See 20 U.S.C. §§ 201c, 241f (1972). We emphasize that if state law prevents a state or local agency from compliance with Title I, then Title I expenditures cannot be manipulated to comply with state law. This would clearly be a case of the tail wagging the dog. Yet this is in essence what the state educational agency proposes and has been doing. The remedy provided for a state that will not or cannot under its own law allocate federal funds in compliance with the Act and the regulations is to have those funds withheld by the United States Commissioner of Education. See 20 U.S.C. § 241j (1972) 45 C.F.R. § 116.52 (1972).

The 1972 National Advisory Council on the Education of Disadvantaged Children has specifically recommended that the law be enforced against Missouri:

"In order to receive title I funds, the State Attorney General must sign an assurance to the U.S. Commissioner of Education stating that all title I regulations will be observed, even if they conflict with State law. Yet with respect to three States—Missouri, Nebraska, and Oklahoma—the Office of Education is aware of noncompliance with the regulations, section 116.19, on service to children enrolled in non-public schools, and no enforcement action has been initiated.

"The Council recommends that any State which is not in compliance with section 116.19 be informed of the Commissioner's intention to enforce the law by the end of fiscal year 1972." National Advisory Council on the Education of Disadvantaged Children, Annual Report to the President and the Congress 29 (1972). (Emphasis theirs.)

Thus, we find that when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises. In other words, we think it clear that the Act demands that if such special services are furnished public school children, then comparable programs, if needed, must be provided the disadvantaged private school child.

FEDERAL CONSTITUTIONAL PROBLEM

This then brings us to the defendants' final contention. They urge—all else failing—that public teacher service on private school premises would be unconstitutional under the First Amendment. The defendants rely on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held the direct subsidization of private school teachers in Pennsylvania and Rhode Island unconstitutional. Perhaps more closely related to this objection are *Wolman v. Essex*, 342 F.Supp. 399 (S.D. Ohio 1972), aff'd, 93 S.Ct. 61 (1972); *Americans United for Separation of Church & State v. Oakey*, 339 F.Supp. 545 (D.Vt. 1972); and *Johnson v. Sanders*, 319 F.Supp. 421 (D.Conn. 1970), aff'd, 403 U.S. 955 (1971). Although *Oakey* and *Sanders* would seemingly prohibit the use of public school teachers on private premises to teach general secular subjects, they are not directly controlling as to the suggested teacher service programs under Title I. As we have indicated, Title I contemplates public teacher services on private premises only for "specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or

welfare services) and only where such specialized services are not normally provided by the nonpublic school.²⁷

Although we find these cases not *directly* controlling, we determine that it would be improper for us to pass on the constitutionality of an abstract program of remedial teaching services which are not properly before us. In doing so, we appreciate the constitutional question remains, but as a reviewing court, we must refrain from passing upon important constitutional questions on an abstract or hypothetical basis. *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 284 (1969); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-462 (1945); *Housing Authority of the City of Omaha v. U. S. Housing Authority*, 468 F.2d 1, 10 (8 Cir. 1972), cert. denied, 41 U.S.L.W. 3447 (U.S. Feb. 20, 1973). This is what we would be doing if we decided this issue now.

We further observe that no particular program, curriculum or service is mandatory under the Act. S.Rep.

²⁷ S.Rep. No. 146, 89th Cong., 1st Sess. 12 (1965). See also Cong.Rec. 5747-5749, 5758, 5979 (1965); 45 C.F.R. § 116.19(a), (e) (1972). The Commissioner's Handbook for State and Local School Officials recognizes this when it observes:

"Most of the restrictions or prohibitions which apply to services for private school children refer to the manner in which the services are delivered. . . . The restrictions or prohibitions are:

1. The services provided with Title I funds must meet the needs of educationally deprived children and not the needs of the private school.
2. In any project where private school students participate along with public school students in public facilities, the classes may not be separated according to school or religious affiliation.
3. Public school personnel may perform services on private premises only to the extent necessary to provide special services for the educationally deprived for whose needs the services were designed.
4. The services which may be provided are limited to special services listing the regulations in Section 116(e), "such as 'therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services.' The list is meant to be illustrative and not exhaustive of the

No. 146, 89th Cong., 1st Sess. 11 (1965); 111 Cong.Rec. 7298 (1965) (remarks by Senator Morse). A local educational agency may request Title I funds for a variety of uses,²⁸ and none of these specific remedial programs are now before us. For now we can only assume that the U. S. Commissioner of Education will approve funds for only those local educational agency programs which comport with Title I and the Constitution of the United States. When approval is given or withheld on a specific plan, only then should a court survey the precise program as falling within or without First Amendment boundaries.²⁹

In conclusion, we find that plaintiffs are entitled to equitable relief in requiring the defendants to comply with Title I through allocation of funds to educationally disadvantaged non-public students. The fact that local

possibilities." normally not available in the private school. (A service is special if it responds to an identified, special need of the child.)

5. The services provided with Title I funds must always remain under the administrative direction and control of a public agency. These services may not be administered by the private school.
6. Title I funds may not be used to pay the salaries of private school employees.
- ...
12. No Title I funds may be used for religious worship or instruction.
13. Work-study assignments may not be made in such a way as to enhance the value of private premises or supplement activities normally financed by the private school.
14. Teacher aids performing services on private premises, as well as those in public schools, must be involved directly in a Title I activity.
15. Title I funds may not be used to contract with a private school to administer a Title I activity."

Office of Education Handbook, *supra* note 23, at 12-14.

²⁸ See 111 Cong.Rec. 7298-7299 (1965) (remarks of Senator Morse), for an extensive list of possible Title I activities.

²⁹ Many factors would be important: what is the precise program offered; in what manner is the remedial program to be offered; does the

agencies have failed to request funds for non-public school children or that private schools have not stated their needs is not justification for denial of an equitable and comparable program for eligible private school children. If the state is to participate in Title I programs, the state has the responsibility to seek out the disadvantaged child and discover his needs. 45 C.F.R. § 116.19(b) (1972).

The record here demonstrates that the basic problem in administering Title I in Missouri has been the tenor of non-cooperation by *both* public and non-public officials. Title I is premised and can work only upon a firm foundation of cooperation by both public and non-public officials. The regulations require that the local educational agency determine the need of the educationally deprived children enrolled in the private school, and this is to be done by "consultation with persons knowledgeable of the needs of these private school children." 45 C.F.R. § 116.19(b) (1972). Implementation of this procedure is the primary responsibility of the state and local officials.³⁰ The record before us is barren of any evidence that non-public school

program fully contemplate the restrictions set forth by the United States Commissioner (see note 27 *supra*); where and when is the program to be offered; what equipment and materials are used; who administers and supervises it; and who benefits from it. These factors must be compiled before applying the tripartite analysis in *Lemon* of whether the program (1) has a secular purpose; (2) possesses a principal or primary effect which neither advances nor inhibits religion; and (3) avoids "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. at 612-613.

³⁰ The National Advisory Council on the Education of Disadvantaged Children has recommended in the past certain steps which undoubtedly would help implement an effective program for non-public school children. Among its recommendations have been:

"[That the states designate] in their departments of education, a liaison officer between public and nonpublic school officials, overseeing the participation of nonpublic school children at the local level. Such an individual would remain in close contact with the official serving that function in the Office of Education in Washington. Similarly, we recommend to local public and nonpublic school officials that they

officials in Missouri have been active consultants in Title I planning or evaluation. This flagrantly violates the Act for the net result of this unauthorized conduct is to neglect the only intended beneficiary of the Act—the disadvantaged child.

The case is remanded to the district court with directions to enjoin the defendants from further violation of Title I of ESEA, and it is further ordered that the court retain continuing jurisdiction of the litigation for the purpose of requiring, within reasonable time limits, the imposition and application of guidelines which will comport with Title I and its regulations.³¹ Such guidelines must provide the lawful means and machinery for effectively assuring educationally disadvantaged non-public school children in Missouri participation in a meaningful

designate an individual with sufficient time and resources to act as a liaison on Title I participation.

"[That] the Office of Education and the states . . . continue to urge the involvement of nonpublic school officials in the planning and evaluation of Title I at the local level. This effort could be given emphasis by providing space on planning and evaluation forms not only for the signature of nonpublic school officials but also for their comments on various aspects of the Title I program. Similarly, the comments of public school officials on the problems they have encountered in encouraging nonpublic participation should be invited.

"[T]hat the Office of Education and the states review the means of identifying eligible children and particularly of establishing target areas. . . .

"[And that where] services to children justify it, there should be an increase in shared time programs, joining public and nonpublic school children in common learning experiences. Such mingling is a positive intent of Title I. Yet few localities include shared time in Title I planning. It should be encouraged by disseminating reports of successful programs which incorporate shared time." National Advisory Council on the Education of Disadvantaged Children, Annual Report to the President and the Congress 42-43 (1969).

The National Council singled out the Title I program in Pittsburgh, Pennsylvania, as a model program of success. We have set out the report on the operation of this plan in the Appendix.

³¹ The Missouri Department of Education regulations as currently phrased will provide a sound basis for supplementation if, and only if, procedural machinery is provided to carry them out. See note 8 *supra*.

program as contemplated within the Act which is comparable in size, scope and opportunity to that provided eligible public school children. Such guidelines shall be incorporated into an appropriate injunctive decree by the district court.³²

Reversed and remanded.

³² Although we do not pass on the merits of plaintiffs' claim for accounting and damages, the granting of equitable relief herewith should not be construed as determining plaintiffs' damage claim. Plaintiffs must overcome other legal barriers if they are to prevail in their prayer for damages. One of the most important of which is that Title I does not contemplate that private schools shall necessarily receive a pro rata share of Title I funds allocated to a state for its disadvantaged children. (See also note 14 supra.) We observe that the continuing litigation over this issue is not apt to be productive and can only result in further friction between the parties. Determination of the present legal conflict now can better lead to a beneficial and cooperative program for all children in Missouri intended to be beneficiaries under the Act. In any event, we direct that the injunctive relief granted herein shall be issued and be effective forthwith.

APPENDIX

A COMMUNITY CASE STUDY OF NON-PUBLIC
SCHOOL CHILDREN AND TITLE I IN
PITTSBURGH, PENNSYLVANIA*

"Pittsburgh is a heavily industrialized city of 650,000 persons. Figures provided by the school system show 122,000 children in the city, 76,000 enrolled in public schools (62%) and 46,000 in nonpublic schools (38%). Of these, 17,500 live in Title I project areas; 13,000 are public school children (74%) and 4,500 are private school children (26%). There are no private schools, other than Catholic schools, in the city with children eligible for Title I funds.

"Title I expenditures for City D have been as follows:

1966-67	School year	\$2,509,000
1967	Summer	21,000
1967-68	School year	3,163,000
1968	Summer	53,000

"A partial listing of programs for the 1966-67 school year are as follows:

* National Advisory Council on the Education of Disadvantaged Children, Annual Report to the President and the Congress B-8—B-11 (1969).

<i>Instructional Activity</i>	<i>Number of Public School Participants</i>	<i>Number of Nonpublic School Participants</i>
Art	1459	0
English-Reading	655	563
English-Speech	377	712
English-Second Language	866	481
Music	6258	531
Recreation	118	0
<i>Service Activity</i>		
Guidance-Counseling	2049	1031
Social Work	348	1086

Planning and Evaluation in Pittsburgh

"Even before Title I allocations were announced for the first year of the program's operation, public school officials were meeting with Catholic school leaders to plan joint programs. The leaders of two systems were not strangers to one another; Pittsburgh has had a long history of shared-time programs. For years parochial school students had traveled to nearby public schools to participate in home economics classes and courses in vocational education. The plan agreed upon for Title I programs was based on a mutual understanding of the needs of disadvantaged children in the two school systems.

"Title I project areas were selected on a school-by-school basis in the public system using census and AFDC information. Once an individual public school was selected

children in the parochial school in the same neighborhood also qualified, so long as Catholic officials verified the assumption that disadvantaged children attended the school in numbers roughly equivalent to the companion public school. According to public school officials, this system was used because the nonpublic school leaders knew they would be responsible for their decision and would behave accordingly. At the same time, public school officials themselves had more than a passing understanding of the composition of Catholic school populations in Pittsburgh.

"Once the project areas were agreed upon, programs were established with services provided equally to the children in the paired public and parochial schools. Approximately 30 percent of the disadvantaged students in Pittsburgh were enrolled in parochial schools and about 30 percent of the Title I funds were expended on these students. In practical terms this has meant that some remedial teachers spend part of their day in the nonpublic school and part in the public school. Few programs mix students from the two systems.

"In the Communication Skills program, for example, where intensive reading preparation is given, half of the teachers spend half of their time in parochial schools. Thus 25 percent of the total program takes place with nonpublic children. This program is concentrated in 11 public schools, but provides services to children in 30 Catholic schools. In other words, 75 percent of the teachers and equipment are located in a few public schools while 25 percent serve children in numerous parochial schools. This arrangement was pressed by Catholic school officials; those public officials in charge of the program feel that students benefit most from a concentration of

services. The U.S. Office of Education, in its guidelines, is explicit in urging such concentration.

"Certain programs, as seen in the listing above, serve only students in public schools, while others serve both in varying proportions. Funds for reducing class size, for example, are not expended for children in parochial schools. Some substitution takes place, however, so that more than 30 percent of the participants in some programs are nonpublic school children.

"According to both Catholic and public schoolmen, evaluation is an on-going process. The deputy superintendent of the Diocese schools and the associate director of compensatory education for the Pittsburgh school system, call one another whenever necessary to discuss Title I programs. Decisions on the retention or expansion for the various components of Title I are discussed at regular joint meetings, occasionally with the public school superintendent in attendance. In one example of what transpires at such gatherings, it was recently proposed by the public school administration that a program involving mobile speech clinics be ended. Parochial officials saw this as undesirable for their children since it would have ended speech therapy in their schools. A compromise finally was reached where one laboratory would be kept to serve nonpublic pupils.

"In part, this joint evaluation is encouraged by a State Department of Education regulation requiring the signature of nonpublic officials on the state evaluation form. This is to insure that consultation with private school leaders has, in fact, taken place. This is a recent regulation, however, and active cooperation was commonplace in Pittsburgh before its enactment.

"Current planning in Pittsburgh includes the establishment of a position within the public school's office of compensatory education to represent the nonpublic schools on a half-time basis. Such a liaison would assist in planning and evaluation and would assure full participation wherever possible. Funds do not presently provide for such an individual, however, and it appears that this plan will not be activated in the immediate future because of the curtailment of Title I funds.

Discussion

"Both public and nonpublic school officials take pride in the harmonious relationship between the two systems. A long history of such cooperation is present, enhanced by a state constitution which has long permitted shared-time programs. Title I is being administered in keeping with this spirit to the satisfaction of all the participants involved.

"Programs in the 1967-68 school year, for which evaluations are not ready at the time of this writing, showed that nonpublic participation was occurring at approximately 30 percent, though probably at a slightly reduced level (one estimate was 27.3% total allocation). Individual program descriptions for 1967-68 demonstrated that disadvantaged nonpublic school children have been considered in the planning of each Title I program.

"There is less inter-mingling of public and nonpublic school children students in Title I programs than might be considered desirable by some observers, including some of the original sponsors of Title I legislation. In part this is the result of the convenience and the economy in shifting teaching personnel from school to school, rather than students. Distance is sometimes a factor, as walking is

not always possible. Also, there are a number of problems associated with moving a large body of students through crowded urban neighborhoods. Such an effort, however, would lead to a sharing of programs between Pittsburgh public schools, many with large nonwhite populations, and Catholic schools, which tend to be filled with mostly white students.

"The nature of the Catholic school organization fosters cooperation. The Catholic Schools Office is highly centralized and has full support of the Bishop of Pittsburgh. The Schools Office has authority to speak for all parochial schools in the City and the Diocese. Thus, the public school officials have only one person with whom they must communicate. This is a tremendous advantage and has contributed greatly to the public/nonpublic cooperation. It would be much more difficult to establish such rapport in cities with autonomous Catholic schools.

"On the whole, the situation in Pittsburgh seems to follow closely the letter and spirit of Title I with regard to the provision of services to disadvantaged nonpublic school children. Nonpublic school officials contribute to both planning and evaluation. Aid is given to nonpublic school children but the nature of that aid is such that careful control seems to be exercised by the public school officials. At the same time, because participation in program formulation is invited and because of frequent intercommunication, the non-public officials are in a position to both assist in, and observe, the operation of Title I. Such a situation would seem to provide a sound basis for informed judgment on the part of public officials with whom responsibility for Title I programs ultimately rests. The real benefactor would seem to be the disadvantaged child in Pittsburgh who is receiving aid regardless of the school he attends, as is the intent of Title I."

STEPHENSON, Circuit Judge, dissenting.

I respectfully dissent. Notwithstanding the view expressed in the majority opinion, Title I of the Elementary and Secondary School Act of 1965 clearly *only permits* and does not mandate the assignment of public school teachers to private schools during regular school hours. That no such congressional purpose ever prevailed is evidenced by the Act's legislative history. The bill's floor manager in the House initially expressed the view that a public school teacher could not be assigned to a private school under the provisions of Title I.¹ Following lengthy debate a compromise was carefully reached by which "The decision about the best arrangement for providing special educational assistance under Title I is left to the public education agency of the school district, under the Constitution and laws of the State." 111 Cong. Rec. 5979 (1965).² Since the Act is only permissive with respect to school teacher assignments, the Missouri State Board of Education, bound by its state constitution and court decisions, could properly determine not to approve school district plans providing for the assignment of public school teachers to private schools during regular school hours.

I therefore find myself in complete agreement with Judge Collinson's conclusion that:

"Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill."

¹ See 111 Cong. Rec. 5743-8 (1965) and G. LaNoue, "Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities," 22 Rutgers L. Rev. 219, 234-235 (1968).

² See also, Sen. R. No. 146, 89th Cong., 1st Sess., 1965 U. S. Code Cong. & Admin. News, 1456-1457.

I would therefore affirm the trial court's denial of injunctive relief.

If, as the majority holds, Title I *mandates* the assignment of public school teachers to private schools, I fail to see how the constitutional issue presented can be avoided. I share in the District Judge's grave concern that Title I, under such circumstances, could not withstand the constitutional challenge. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Americans United for Separation of Church and State v. Okey*, 339 F.Supp. 545 (D. Vt. 1972) and *Johnson v. Sanders*, 319 F.Supp. 421 (D. Conn. 1970), *aff'd* 403 U.S. 955 (1971). The "entanglements" fostered by Title I, as construed by the majority, appear quite indistinguishable from the excessive entanglements proscribed by *Lemon*. See generally, 22 Rutgers L. Rev., *supra*.

I join in the majority's concern with respect to the failure of the parties to negotiate a lawful program pursuant to the Act. Unfortunately, the victims of this lack of cooperation are the intended beneficiaries of Title I, the educationally deprived children.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Civil Action No. 18248-2

**ANNA BARRERA, et al.,
Plaintiffs,**

vs.

**HUBERT WHEELER, individually and in his capacity as
COMMISSIONER OF EDUCATION, STATE OF
MISSOURI, et al.,
Defendants,**

and

**THE AMERICAN CIVIL LIBERTIES UNION OF
WESTERN MISSOURI AND GREATER
KANSAS CITY,
Amicus Curiae.**

Memorandum and Opinion

(Filed June 2, 1972)

Plaintiffs are parents of parochial school children, who bring this suit individually and on the behalf of the minor plaintiffs as a class suit on behalf of all educationally deprived children attending nonpublic schools in the State of Missouri.

The defendants are the Commissioner of Education of the State of Missouri, both officially and individually, the Missouri State Board of Education, and the members of the State Board of Education, both individually and as members of the board.

Plaintiffs seek, in part, to secure an injunction against the defendants directing the manner in which the United States Government grant of some Twenty-five to Thirty Million Dollars annually to the State of Missouri under the Elementary and Secondary Education Act of 1965, Title I (Title 20, U.S.C. §§ 241 through 244), shall be expended.

The Court has declared this case to be a proper class suit. This injunction issue has been separated and tried separately.

The Act in question, commonly referred to as "Title I," provides for federal aid to "educationally deprived children." As a practical matter, such children are identified by the income of their family. Each state receives money (without any matching state funds) under a formula which considers the number of school age children from low income families.

In Missouri the federal funds are paid to the State Board of Education. This Board, in turn, allots the funds to local school educational agencies (local school boards) based upon their application showing the number of educationally deprived children in the local school district (including those enrolled in private schools). It is the duty of the local authorities to submit in the application a plan for participation of the private school educationally deprived children in the services to be offered by the money allocated.

Omitting all the legal verbiage in this case, the basic issue is very simple. Most of the funds allocated under this Act to public schools are used to employ teachers to instruct in remedial subjects. The defendants have refused to approve any applications allocating money for teachers in parochial schools during regular school hours. The defendants will approve the use of money to provide mobile educational services and equipment, visual aids, and edu-

cational radio and television in parochial schools. Teachers for after-school classes, weekend classes, and summer school classes, all open to parochial school pupils, have all been approved.

In the larger city districts the parochial school authorities have been adamant in demanding full participation in teacher services by demanding the assignment of teachers employed under this program to parochial schools during regular school hours.

This head-on conflict on the proper interpretation of Title I has resulted in an undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic schools in some local school districts in the state. On the other hand, the private school pupils could undoubtedly receive an equitable proportion of the funds through after-school and summer school instruction programs, if requested by the private school authorities.

The plaintiffs contend, however, that if the defendants authorize the employment of teachers in the public schools during regular school hours, then Title I mandates the employment of teachers in the nonpublic schools on an equitable basis (average expenditure per pupil).

Title I has a very curious legislative history. The debate in the House is fully reported in the Congressional Record of the House on March 24, 1965, pp. 5743 to 5749. The precise constitutional issue of whether the bill provided salaries for teachers in parochial schools was never answered. Opponents of such aid were assured the bill did not authorize such expenditure. Proponents were assured that the question was solely one for local authorities. A most interesting article on the debate and the constitutional questions left unanswered is found in an article in *Rutgers Law Review*, Vol. 22, Number 2, "Church-State Problems

in New Jersey: *The Implementation of Title I (ESEA) in Sixty Cities*," by George R. LaNord. See also, Comment, *The Elementary and Secondary Education Act of 1965 and The First Amendment*, 41 Ind. L.J. 302; Feikens, *The Elementary and Secondary Education Act—The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I*, 65 Mich. L.Rev. 1184.

The Senate report is no less fuzzy. "It should be emphasized, however, that no suggested program (for private school students) is in itself mandatory upon a public school authority. The selection of an appropriate program or programs, for which State educational authority approval is sought, rests with the local educational agency." U.S. Cong. & Admin. News '65, 1456-7.

Title I itself simply provides that there shall be "special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such (private school) children can participate." 20 U.S.C. § 241e (a) (2).

The defendants and amicus curiae argue strenuously that the Missouri constitution prohibits the use of any money for schools, regardless of the source, for the employment of teachers in parochial schools. This question has never been passed upon by a Missouri court. However, determination of that question is not necessary in arriving at a decision in this case.

All the parties to this suit agree that the federal funds received under Title I by the State of Missouri should be expended equitably for the benefit of all "educationally deprived children" in this state regardless of whether they attend a public or nonpublic school. Does an "equitable expenditure" require teacher services in parochial schools during regular school attendance hours if such services are provided in public schools?

The evidence in this case disclosed, for example, that there were 11,000 eligible students in the public schools of Kansas City, and 355 eligible students in all the parochial schools in Kansas City. A maximum of twenty teachers were employed by the local school board with the allocated Title I funds. Should this Court order that one of these twenty should be assigned to teach in all the parochial schools in Kansas City? The parochial school students were furnished supplies and equipment from Title I funds, and the students participated in summer school programs financed by Title I funds. In the many smaller school districts in the state the problem of equitable distribution of funds solely by teacher assignments would undoubtedly create a serious problem.

Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill. It is also clear that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs. In smaller school districts the furnishing of visual aids and mobile equipment could very easily furnish the equitable share of dollar aid.

There is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds. Similarly, there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in the nonpublic schools.

This Court does not believe the above facts entitle the plaintiffs to any equitable relief in this suit.

The Court has not referred to the First Amendment questions which undoubtedly exist in this case. The plaintiffs, of course, have not raised this question. The defendants, who undoubtedly welcome this Twenty-five to Thirty Million Dollar annual largesse from Washington, have carefully skirted the question by simply stating that they do not question the constitutionality of Title I as interpreted by the defendants (not requiring the assignment of teachers in parochial schools).

Under the Court's interpretation of Title I, the constitutional question is not presented. But, if this Court's interpretation is incorrect, then certainly the teachings of the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), would raise serious questions as to the constitutionality of Title I.

It is therefore

ORDERED that plaintiffs' prayer for an injunction in this case be and is hereby denied. Costs taxed to plaintiffs.

/s/ William Collinson
District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Number 18248-2

**ANNA BARRERA, et al.,
Plaintiffs,**

vs.

**HUBERT WHEELER, et al.,
Defendants.**

**Injunction and Judgment Issued in Compliance
with Mandate**

(Filed May 9, 1973)

The Judgment of the United States Court of Appeals for the Eighth Circuit in the above styled cause, having been entered and filed in the United States District Court for the District of Missouri, Western Division, on May 1, 1973, ordering that this cause be remanded to this court for proceedings in accordance with the majority opinion of the United States Court of Appeals, and by said majority opinion ordering this court to enjoin the Defendants from further violation of Title I of the Elementary and Secondary Education Act of 1965 (ESEA) and ordering the court to retain continuing jurisdiction of this litigation.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendants and each of them, their agents, employees, and all other persons acting under the direction or authority of them, be and they are hereby perpetually enjoined and restrained as follows:

1. Ordered and enjoined that when the needs of eligible children require it, special personnel services may

be furnished under Title I by the public agency on private as well as public school premises, and further if such special personnel services are furnished public school children during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends. Defendants are enjoined from disapproving any application of a Local Educational Agency (LEA) for the grant of Federal Title I ESEA Funds on the basis that such application includes the use of Title I personnel on private school premises during regular school hours.

2. Ordered and directed that based on determined need of the eligible private school pupil, all Title I ESEA applications shall provide services and activities which meet the special need of such pupil and which are comparable and equitable in quality, scope and opportunity for participation to those provided to eligible public school pupils similarly situated.

3. Ordered and directed that where an application makes available free transportation to eligible public school pupils at Title I expense then said free transportation shall be provided to eligible private school children similarly situated.

4. Ordered and directed that each application under Title I, ESEA, shall clearly evidence that persons knowledgeable of the needs of the private school children have been consulted in the planning and evaluation of such Title I projects at all stages.

5. Defendants are enjoined from approving any application by an LEA for a Title I Grant unless such application fully complies with the provisions of this Order and

the Mandate and majority opinion of the United States Court of Appeals for the Eighth Circuit.

6. Defendants are ordered and directed to conform any regulations, guidelines, policies, instructions (verbal or written), applications, and other Title I forms previously or hereafter issued by Defendants, their agents, employees and all other persons acting under their direction or authority, and any practices or procedures used by them, to the provisions of this Order and the Mandate and majority opinion of the United States Court of Appeals for the Eighth Circuit.

7. The Defendants are ordered and directed to immediately notify all public school and private school administrators of the rights of eligible private school children under Title I ESEA by distributing to each of them a copy of this Injunction And Judgment Issued In Compliance With Mandate and a copy of the majority opinion of the United States Court of Appeals for the Eighth Circuit.

8. The Defendants are ordered and directed to make available on a permanent and continuing basis, for convenient inspection and copying by Plaintiffs or their representatives during regular office hours, all records and documents regarding ESEA and its implementation in the State of Missouri.

9. It is Ordered that this Injunction And Judgment Issued In Compliance With Mandate shall be effective forthwith and that this court retains continuing jurisdiction of this litigation to assure that eligible pupils attending private schools participate in meaningful programs as contemplated within ESEA. Costs be taxed to Defendants.

/s/ William R. Collinson
District Judge

Date: 5/9/1973

APPENDIX D

Judgment

(Filed March 16, 1973)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

September Term, 1972

No. 72-1440

Anna Barrera, individually and as Next Friend for Joanna Barrera, Patricia Barrera, Diana Barrera, Maria Barrera, minors; Odis Brown, individually and as Next Friend for Richard Brown, a minor; Billie Hayes, individually and as Next Friend for Elaine Hayes, Evelyn Hayes, George Hayes, Billie Joe Hayes, minors; Garrett Jones, individually and as Next Friend for Janice Jones, a minor; Vinancio Rea, individually and as Next Friend for Esteben Rea, a minor; Paul Rojas individually and as Next Friend for Yolanda Rojas, Mario Rojas, Katrina Rojas, minors; Patricia Wyatt, individually and as Next Friend for Kevin Wyatt; Rafael Zapien, individually and as Next Friend for Anna Lisa Zapien, Regina Zapien, Hope Zapien, Ruby Zapien, minors,
Appellants,

vs.

Hubert Wheeler, Commissioner of Education, State of
Missouri, et al.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

This cause came on to be heard on the record from
the United States District Court for the Western District
of Missouri.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause, be, and it is hereby remanded to the said District Court for proceedings in accordance with the majority opinion of this Court this day filed herein.

Costs taxed in U.S. Court of Appeals,
Eighth Circuit:

Clerk's Docketing fee	\$ 25.00
Reproduction of Appendix and Exhibit Volumes	1096.00
Brief appellant (25 copies)	362.38
Reply brief appellant	115.00
Suppl. Memo of Appellant	106.13
Total costs of Appellants for recovery from Appellees in the U. S. District Court.	<hr/> \$1704.51

A true copy.

Attest:

Clerk, U. S. Court of Appeals, 8th Circuit.

/s/ Robert C. Tucker

By /s/ W. F. Gruninger
Chief Deputy

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

September Term, 1972

No. 72-1440

**Anna Barrera, etc., et al.,
Appellants,**

vs.

**Hubert Wheeler, etc., et al.,
Appellees.**

**Appeal from the United States District Court for the
Western District of Missouri.**

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 11, 1973

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Civil Action No. 18248-2

**ANNA BARRERA, et al.,
Plaintiffs,**

vs.

**HUBERT WHEELER, individually and in his capacity as
former COMMISSIONER OF EDUCATION, STATE OF
MISSOURI, MISSOURI STATE BOARD OF EDUCATION,
J. WARREN HEAD, DALE M. THOMPSON, MRS. TRUE
DAVIS, JACK WEBSTER, ELSTON J. MELTON, W.
CLIFTON BANTA, SIGNEY R. REDMOND, F. BURTON
SAWYER, HARVEY B. YOUNG, JR., ELEANOR B.
GRIFFITH, and ARTHUR B. MALLORY, present COM-
MISSIONER OF EDUCATION,**

Defendants.

Notice of Appeal

(Filed June 6, 1973)

Notice is hereby given that all the defendants above
named hereby appeal to the United States Court of Appeals
for the Eighth Circuit from the Order and Judgment en-
titled "Injunction and Judgment Issued in Compliance with

Mandate" of this Court, dated and entered on May 9, 1973
and from each and every part thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-62

HUBERT WHEELER, et al.,
Petitioners,

vs.

ANNA BARRERA, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Respondents do not accept Petitioners' statement of the questions presented or statement of the case.

The real issue is whether the petitioners will cease to deprive educationally deprived nonpublic school children enrolled in nonpublic schools of the equitable educational benefits they are entitled to under Title I of the Elementary and Secondary Education Act of 1965. 20 U.S.C. §241a et seq. (Hereinafter referred to as Title I, ESEA.) The issue is not a constitutional one. It is not a matter of statutory construction. Simply, the real issue is whether the petitioners will comply with the intent of Congress as expressed in the Elementary and Secondary Education Act and the criteria of the United States Commissioner of Education as set forth in his regulations and guidelines.

Respondents are educationally deprived children attending a predominantly Negro and a predominantly Mexican-American nonpublic school in the inner city of Kansas City, Missouri. They are eligible beneficiaries under Title I, ESEA. They have been denied by petitioners the benefits to which they are entitled under Title I.

The intent of Congress in enacting Title I, ESEA, was to meet the needs of all educationally deprived children in low-income areas, regardless of where they went to school. In the words of the Eighth Circuit Court of Appeals:

"The Act made it the strict responsibility of the local educational agency to plan and administer programs that would meet the particularized needs of all educationally disadvantaged children. Thus, the undisputed purpose of Title I was to benefit the educationally deprived child whether attending a public or nonpublic school." (Appendix A, page A5).

The vast majority of Title I, ESEA services involve personnel. In the fiscal year 1971, over 77% of Title I expenditures in Missouri were for personnel, over 67% were for instructional personnel alone (Appendix in the Eighth Circuit Court of Appeals, Volume I, pages 55 and 56). There are only two basic ways of providing personnel services during regular school hours to Title I children attending nonpublic schools. The first is by dual enrollment; that is, allowing the nonpublic school child to go on a part-time basis to the public school for Title I services. The second is by bringing the services to the child, that is, by allowing the Title I teacher to provide services on nonpublic school premises or by sending a mobile teaching unit with teachers to the nonpublic school (See: USOE Handbook, page 11, Defendants' Exhibit No. 5).

The Missouri State Board of Education has perennially directed that children enrolled in nonpublic schools must not participate in Title I benefits rendered by educational personnel during regular school hours. This position of the Missouri State Board prohibits dual enrollment and so effectively eliminates children enrolled in nonpublic schools from any participation in some seventy percent (70%) of all Title I opportunities. According to a survey made by the United States Office of Education at the request of the Court of Appeals, the Missouri State Board is the only state educational agency in the nation that prohibits both the teacher from going to the pupil and the pupil from going to the teacher.

Petitioners have offered to approve programs conducted after regular school hours for nonpublic school children. All witnesses in this case agree that after-hour programs are inferior to programs conducted during regular school hours. Hubert Wheeler, former State Commissioner of Education, testified by Deposition (Appendix, Eighth Circuit Court of Appeals, Volume II, pages 87 and 88):

"Q. Would it be a disadvantage to provide Title I services after regular school hours?"

"A. A disadvantage."

"Q. Yes sir."

"A. There may be a few that are performed after school hours, but it would be a disadvantage to provide all of Title I after school hours, yes."

"Q. Would it be a disadvantage to provide Title I on Saturdays?"

"A. If you can get it any other days, it certainly would."

"Q. How about during the summer, if you could get it during the school year?"

"A. Thinking of my own sixteen year old daughter, I would a lot rather they would get it in the nine months' time than to have to go in the summer time, too. Everyone would feel the same way, I think. They are entitled to go during the day and get it. If they could get it during the week, it would be best."

Edward Downey, Title I Director for the Kansas City Public School District, testified (Appendix, Eighth Circuit Court of Appeals, Volume III, page 43):

"A. It is most difficult for special services to be provided without personnel as is evidenced by the non-public school or, pardon me, public school making use of such personnel to carry out an effective program."

After extensive cross-examination, Mr. Downey reiterated (page 59), "In my judgment, the provision of personnel would be advantageous." When asked if an after-hour program could be made comparable by spending an equal amount of money as spent on public school programs during the regular hours, he stated (page 80), "It would be comparable in dollar amount spent, in my judgment, it would not be comparable as far as . . . educationally most appropriate."

The record in this case shows gross inequities in the extension of Title I, ESEA benefits insofar as nonpublic school educationally deprived children in Missouri are concerned. A representative sample of actual Title I, ESEA programs was introduced into evidence. The sample included two metropolitan, a suburban and a rural school district. Although ESEA does not require an exact per capital expenditure for each and every child eligible for benefits under Title I, per capita expenditure is a significant means of measuring whether or not the program provides an equitable service. The following table com-

per capita expenditures in these four representative school districts.

School District	Expenditure per public school child	Expenditure per private school child
Berkley	\$210	\$85
Linn	\$244	\$30
Kansas City	\$250	\$25
St. Louis	\$242	\$10

Respondents sought a preliminary injunction in the trial court seeking to enjoin petitioners from continuing to approve Title I programs with such grossly inequitable per pupil expenditures. Petitioners admitted that if the injunction were granted, it would be necessary for them to re-allocate between \$5 and \$6 million (Appendix, Eighth Circuit Court of Appeals, Volume III, page 29).

The District Court found that there were inequitable expenditures of Title I, ESEA funds between Title I children in public and nonpublic schools, but was of the opinion that if equal funds were spent in after-hour programs, the services would be equitable. Thus, the District Court did not grant respondents relief (Petition for Certiorari, Appendix B, page A41).

The Eighth Circuit Court of Appeals found that it was not a comparable program to provide after-hour services to needy private school children while offering the same services during regular school hours to deprived public school pupils (Petition for Certiorari, Appendix A, page A15). The majority opinion stated (page A16):

"Once the need of all qualified students is determined, the state or local educational agency must then show some reasonable justification, within the defined purposes of the regulations and the Act, for denying com-

parable services to eligible private school pupils. No showing has been made here."

The Court of Appeals reversed and remanded.

**PETITIONERS' APPLICATION FOR WRIT OF
CERTIORARI SHOULD BE DENIED FOR
THE FOLLOWING REASONS:**

1. Courts are not in conflict.

The decision of the Eighth Circuit Court of Appeals in this case is not in conflict with the decision of any other United States Court of Appeals.

2. There is no conflict with state law.

The Eighth Circuit Court of Appeals did not decide an important question of law in conflict with any applicable state law.

In stating the questions presented and in argument, petitioners have asserted that the decision of the Eighth Circuit is contrary to state law. This assertion is simply untrue.

While there is no statute of Missouri or any decision of a Missouri state court bearing directly on these issues, the Petitioners seem to rely on the opinion in *Special School District v. Wheeler*, Mo., 408 S.W. 2d 60, in maintaining that state law forbids sending educational personnel, employed by public agencies under Title I, ESEA, onto nonpublic school premises to render Title I services. In the *Special District* case, the Supreme Court of Missouri merely held that teachers, paid out of the state public school fund, could not be sent to perform educational services on nonpublic school premises. The decision rests on

the finding that such use of the public school fund was not permitted, I.c. 63. The decision does not even apply to other state funds, and certainly has no relevancy to the use of Federal funds. Title I, ESEA is 100% federally funded. The Attorney General of Missouri, in issuing an official opinion, took into consideration the *Special District* case and ruled that public school personnel, paid with federal funds, pursuant to Title I, ESEA, may be made available on the premises of nonpublic schools to provide special services to eligible children and that this did not violate Missouri law (Petition for Certiorari, Appendix A, page A20).

The Missouri State Constitution also expressly provides as follows (Petition for Certiorari, Appendix A, page A24):

"Money or property may also be received from the United States and be distributed together with public money of this State, for any public purpose designated by the United States. Missouri Constitution, Article III, Section 38 (a)."

Even the District Court found that the question had never been passed on by a Missouri Court (Petition for Certiorari, Appendix B, page A42).

The decision of the Eighth Circuit is not in conflict with Missouri law.

3. This case does not present an important federal question.

At the request of the Eighth Circuit Court of Appeals, a survey was made of all 50 states as to the manner of participation of nonpublic school children in regular school hour programs. The survey demonstrated that the Missouri State Board of Education was the only state educational agency in the nation that prohibits both the teacher

from going to the pupil and the pupil from going to the teacher. Many states allow both dual enrollment and the providing of Title I services by Title I personnel on non-public school premises. Thus, the practical effect of this case appears to be only on the State of Missouri and the practices of its State Board of Education.

The mere fact that this case involves the application of a federal statute does not per se create "an important question of federal law."

4. The decision of the Eighth Circuit Court of Appeals does not conflict with applicable decisions of this Court.

The decision of the Eighth Circuit Court of Appeals is consistent with the decisions of this court in such cases as *Lemon v. Kurtzman*, 403 U.S. 602, *Earley v. DiCenso*, 403 U.S. 602, and *Sanders v. Johnson*, 403 U.S. 955.

In *Lemon, supra*, this court approved the provision of "secular, neutral, or non-ideological services, facilities or materials" (page 616). Such services, supplied in common to all students, have been considered by this Court as not to offend the Establishment Clause. The services offered under Title I, ESEA, are special services only, and do not include general education. They are offered in common to all educationally deprived children. They are the type of services that this Court referred to in *Lemon*.

Title I, ESEA clearly meets the secular purpose and effect test. Religious instruction or activities are expressly prohibited, e.g. 45 C.F.R. Section 116.53(e). No one contends that anything other than secular services will be offered.

Under Title I, ESEA there is no "excessive entanglement" between government and religion. All property

and personnel are wholly under the control of public agencies. 45 C.F.R. Sections 116.19(e) and 116.20; 20 U.S.C. Section 241(e)(a)(3). In *Lemon*, *DiCenso*, and *Sanders*, personnel were employed by and under the control of the nonpublic school. No Title I funds go to or through any nonpublic school in any way. In *Lemon* and *Sanders*, nonpublic schools received direct payments of public funds. In *DiCenso*, nonpublic school teachers received direct payments. Because nonpublic schools do not in any way have contact with public funds under Title I, there is no requirement that they submit to audits or accountings to public agencies. All funds are administered by a public agency and must be accounted for by that public agency. This is not any different when personnel is provided on nonpublic school premises. In *Lemon* and the other cases, nonpublic schools were required to account for public funds which they received, and also to open their records for audit.

No surveillance is required of a nonpublic school or nonpublic school personnel under Title I, ESEA. In *Lemon* and the other cases, this Court concluded that because personnel were under the control of a church agency, surveillance to maintain secularity would be required. Personnel under Title I are employed by the public school district and under its administrative direction and control. 45 C.F.R. Section 116.19(e).

The absence of any real constitutional question is emphasized by the recent decisions of *Committee for Public Education v. Nyquist*, 93 S.Ct. 2955 (June 25, 1973), and *Sloan v. Lemon*, 93 S.Ct. 2982 (June 25, 1973). In these cases the Court considered statutory schemes to provide tuition grants, income tax benefits, and tuition reimbursement payments for parents of children in nonpublic schools. Substantially all of the nonpublic schools

were religious schools, so the principal beneficiary of the statutes would be the religious schools. These statutes were deemed unconstitutional, and the reason for the holding was that the statutes were designed with the principal effect of aiding religion. *Committee for Public Education, supra*, *Sloan, supra*, 93 S.Ct. 2969, 2971, 2972, 2976, 2986, 2987, 2988.

The principles stated in Title I, ESEA are far different. Title I, ESEA is designed to meet the educational needs of *all* educationally deprived children, with no class distinctions, and with the clearly stated purpose of "meeting the special educational needs of educationally deprived children." 20 U.S.C. 241a, *Barrera v. Wheeler*, 475 F. 2d 1338, 1341, 1342. Since the purpose of Title I, ESEA is *not* designed to benefit a comparatively small sectarian class *nor* to benefit a religion, it must be said that Title I, ESEA and the decision of the Court of Appeals is consistent with the directions of court as stated in *Committee for Public Education, supra*, and *Sloan, supra*. Indeed, these recent cases again affirm the propriety of furnishing bus transportation and secular textbooks. 93 S.Ct. 2966, 2986.

In *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921, this Court denied a petition for writ of certiorari. In that case, a Title I, ESEA program was conducted in premises leased from a nonpublic school. Both public and nonpublic school children attended the Title I programs during regular school hours. The Supreme Court of Nebraska upheld the legality of the program stating, "It would seem that to deny students the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school, would violate the students' right to a free exercise of religion and equal protection of

the law." *School District of Hartington v. Nebraska State Board of Education*, Nebr., 195 N.W. 2d 161, 164.

In an opinion supporting the denial of the petition for certiorari in the case, Justice Brennan noted that there was not the slightest suggestion that this was a subterfuge to make a subsidy to the parochial school. He further noted that the remedial reading and remedial math courses offered under that Title I program would operate completely independent of the curriculum and of the Catholic school administration. In his words, the Title I program was "poles apart" from the situation in *Sanders*, *Lemon*, and *DiCenso*. He concluded, "The accommodation involved in this case would not trespass beyond permissible bounds." *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921, 926.

The *Hartington* decision supports the fact that the decision of the Eighth Circuit Court of Appeals in this case was not in conflict with applicable decisions of this Court and that the petition for certiorari should be denied.

"It is precisely because a denial of a petition for certiorari without more has no significance as a ruling, that an explicit statement of the reason for denial means what it says." *Parker v. Ellis*, 362 U.S. 574, 576.

5. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

6. Certiorari before judgment is not warranted.

This is a petition for writ of certiorari to the Eighth Circuit Court of Appeals. On June 6, 1973, petitioners filed a notice of appeal to the Eighth Circuit Court of Appeals in this same case. That appeal has not been disposed of and is currently pending before the Eighth Circuit Court

of Appeals. Petitioners invoke jurisdiction under 28 U.S.C. §2101(e) (Petition for Certiorari, page 2).

Pursuant to Rule 20 of this Court, certiorari should not be granted unless there is a showing that this case is "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." There is no such showing in this case.

7. Petitioners do not have standing to raise the constitutional questions which are untimely asserted in their petition for certiorari.

The responsibility of the petitioners is to review all Title I, ESEA applications from local educational agencies in the State of Missouri and only to approve such as are in compliance with the Act and the criteria established by the United States Commissioner of Education. 20 U.S.C. Section 241e. Petitioners have never pointed out any constitutional right or interest of theirs which is in conflict with the directions they have received from Congress and the United States Commissioner of Education. It is fundamental that the petitioners cannot challenge the constitutionality of the Act unless they are in some manner the victim of the unconstitutional element of which they complain. *Bode v. Barret*, 344 U.S. 583.

In *Columbus and Greenville Railway Company v. Miller*, 283 U.S. 96, this Court considered the question of the standing of the state officer to complain of a constitutional question. In resolving the issue against the state officer, the Court stated, l.c. 99:

"... while so far as state practice is concerned, the authority of a public officer to assail to the courts of the state a constitutional validity of a state statute is a

local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasion of personal or property rights or through the discrimination which the amendment forbids. The constitutional guarantee does not extend to the mere interest of an official as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

In *Tennessee Power Electric Company v. Tennessee Valley Authority*, 306 U.S. 118, the complainants contended that the statutory plan for the Tennessee Valley Authority Act was unconstitutional. And they further contended that their rights would be violated by the Tennessee Valley Authority acting pursuant to the statute. The Court held that any infringement or injury was too contingent and remote to give standing to attack the constitutionality of this statute, stating, *l.c.* 137:

"The appellants have invoked the doctrine that one threatened with direct and special injury by the act of an agent of the government which come up but for the statutory authority for its performance, would be in violation of his legal rights, may challenge the validity of the statute in the suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on the statute which infers a privilege."

Petitioners here have failed to make any showing by pleading, proof or argument that they are endowed with any interest which could possibly be adversely affected

by the fair and equitable enforcement of the Elementary and Secondary Education Act. In the absence of such showing, the petitioners may not complain of the constitutional validity of the statute.

Petitioners have not preserved and do not properly present any constitutional issue.

The petitioners now assert, "The constitutional issue is squarely before the court at this time." (Petition for Certiorari, page 14). This is the first time that petitioners have asserted that the constitutional issue is directly involved.

The District Court noted that the petitioners had carefully avoided the constitutional question in order that their access to federal money would not be jeopardized (Petition for Certiorari, Appendix B, page A44). The Court of Appeals recognized the fact that the constitutional question was not presented in such a way as to make it a real issue for the court, and they refused to pass on any constitutionality question on such an "abstract or hypothetical basis" (Petition for Certiorari, Appendix A, page A26).

Respondents submit that this court does not pass on issues which have not been decided in the lower courts. *Walters v. City of St. Louis*, 347 U.S. 231. This principle is particularly true of constitutional issues. A party relying on a constitutional issue must present it completely and properly to the trial court and intermediate courts before the issue can be determined in the Supreme Court. *Shelley v. Kramer*, 334 U.S. 1.

Since the constitutional issue, if any, was not pleaded and fully asserted in the lower court, petitioners cannot now be heard to complain of the constitutionality of the Elementary and Secondary Education Act.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

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20 U.S.C. 241e(a) (2)	9, 16, 29, 34
20 U.S.C. 241(e) (2)	5
20 U.S.C.A. 1232a	25

MISCELLANEOUS

Board of Education of the City of New York, "Guidelines for Supervision of Board of Education Personnel in Non-Public Schools, ESEA Title I Programs	27, 39
Commission of Education, Title I Program Guide No. 44, 4.5 (1968)	23, 24, 32
Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969)	41

IV

Hitteman, Final Report of an Evaluation of the Corrective Reading Service in Non-Public Schools, July 1972	38
H. Rep. No. 143, 89th Cong. 1st Session	17, 18
Jefferson, Statute for Establishing Religious Freedom (12 Henning, Virginia Statutes, 85)	40-41
Justman, An Evaluation of Non-Public School Participation in District Decentralized ESEA Title I Programs, 1970-1971 School Year	38
LaNoue, Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities, 22 Rutgers L. Rev. 219 (1968)	11, 27, 33, 40
Ringler and Pedhazur, An Evaluation of the Corrective Program for Disadvantaged Pupils in Non-Public Schools, New York Title I Project (1971)	11, 33
S. Rep. No. 146, 89th Cong. 1st Session	17, 18
<i>Title I ESEA Participation of Private School Children: A Handbook for State and Local Officials (1971)</i>	<i>9, 10, 11, 12, 19, 20-21, 22, 24, 40</i>

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, individually and in his capacity as former Commissioner of Education, State of Missouri, MISSOURI STATE BOARD OF EDUCATION, J. WARREN HEAD, DALE M. THOMPSON, MRS. TRUE DAVIS, JACK WEBSTER, ELSTON J. MELTON, W. CLIFTON BANTA, SIDNEY R. REDMOND, F. BURTON SAWYER, HARVEY B. YOUNG, JR., ELEANOR B. GRIFFITH, and ARTHUR B. MALLORY, present
Commissioner of Education,

Petitioners,

VS.

ANNA BARRERA, individually and as Next Friend for JOANNA BARRERA, PATRICIA BARRERA, DIANA BARRERA, and MARIA BARRERA, minors, ODIS BROWN, individually and as Next Friend for RICHARD BROWN, a minor, BILLIE HAYES, individually and as Next Friend for ELAINE HAYES, EVELYN HAYES, GEORGE HAYES, BILLIE JOE HAYES, minors, GARRETT JONES, individually and as Next Friend for JANICE JONES, a minor, VINANCIO REA, individually and as Next Friend for ESTEBEN REA, a minor, PAUL ROJAS, individually and as Next Friend for YOLANDA ROJAS, MARIO ROJAS, KATRINA ROJAS, minors, PATRICIA WYATT, individually and as Next Friend for KEVIN WYATT, RAFAEL ZAPIEN, individually and as Next Friend for ANNA LISA ZAPIEN, REGINA ZAPIEN, HOPE ZAPIEN, RUBY ZAPIEN, minors,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 475 F.2d 1338 (1973), and is reprinted in full in the Petition for Certiorari herein at pp. A1-A38. The opinion of the District Court is unreported; it is set forth in the Petition for Certiorari herein at pp. A39-A44.

JURISDICTION

The judgment of the Court of Appeals (Petition for Certiorari, pp. A48-A49) was entered on March 16, 1973. The order of the Court of Appeals denying a timely petition for a rehearing (*ibid.*, p. A50) was entered on April 11, 1973. The order and judgment of the District Court on remand (*ibid.*, pp. A45-A47) was entered on May 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

STATUTE AND REGULATORY PROVISION INVOLVED

Title I of the Elementary and Secondary Education Act of 1965 (hereinafter, the Act), 20 U.S.C. 241e provides in pertinent part:

"(a) A local educational agency may receive a grant under this part for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

(1) that payments under this part will be used for programs and projects (including the acquisition of

equipment, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, * * * and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this part * * *;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *."

Section 116.19 of the Regulations of the United States Commissioner of Education provides in part:

"(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such ar-

rangements as dual enrollment, educational radio and television, and mobile educational services and equipment. . . .

"(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.

"(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. . . .

"(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

"(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such

special services were designed and only when such services are not normally provided by the private school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. . . . Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities." 45 C.F.R. §116.19 (1972).

QUESTIONS PRESENTED

1. Does the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241(e)(2), require that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours?

2. If the Act does so require, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?

STATEMENT OF THE CASE

The respondents, parents of children attending religious schools, brought this class suit against the Missouri State Commissioner of Education and members of the State Board of Education, alleging that Title I services were

being arbitrarily denied to children attending nonpublic schools in Missouri. Respondents prayed for an injunction and for an accounting of some \$13 million received and expended under the Act from 1966 through 1969. The District Court dismissed the complaint on the ground that the plaintiffs had failed to exhaust their administrative remedies and that the Federal court should abstain from exercising jurisdiction since the case involved the unsettled question whether Missouri law forbade assignment of Title I funded teachers to serve in religious schools during regular school hours. The decision of the District Court was held by the Court of Appeals to be erroneous, and the case was remanded for trial, *Barrera v. Wheeler*, 441 F.2d 795.

On the trial the defendants conceded that because of contrary State law, they had refused to approve any plan or program for use of Title I funds which involved assigning publicly employed teachers to perform their educational duties in church schools during regular school hours. They conceded also that in some school districts at some times less money was expended for Title I services actually utilized by children enrolled in church schools than for the same services utilized by children enrolled in public schools.

The defendants further argued that neither the Act nor the Regulations of the Commissioner of Education promulgated thereunder mandate the assigning of publicly employed teachers to serve in church schools during regular school hours, and to the extent that they may have authorized it they are unconstitutional under the Establishment Clause of the First Amendment.

The defense also contended that the disproportionate expenditure as between public and church schools, in the cases in which they did occur, resulted not from any malfeasance or bad faith on their part but exclusively from

the refusal of the church school authorities to participate in or cooperate with any teaching program which did not involve the assignment of teachers to serve in the church schools during regular school hours, and that when the authorities did elect to participate and cooperate in after-hour or summer programs the amounts expended for church school enrollees equalled or exceeded the amounts expended for public school enrollees.

The District Court found in the defendants' favor on both the law and the facts. On the law, the Court ruled that the Act did not mandate sending publicly employed teachers into church schools, and if it did it "would raise serious questions as to the constitutionality of Title I." On the facts, it held that "the private school pupils could undoubtedly receive an equitable proportion of the funds through after-school and summer school instruction programs, if requested by the private school authorities," that there "is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds," and that "there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in nonpublic schools." (Petition for Certiorari p. A43)¹

1. The District Court said:

"Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill. It is also clear that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs. In small school districts the furnishing of visual aids and mobile equipment could very easily furnish the equitable share of dollar aid.

(Continued on following page)

Over the dissent of Judge Stephenson, who agreed with the District Court's conclusions, the Court of Appeals reversed and remanded the case to the District Court with direction to enjoin the defendants from further violation of the Act and to retain jurisdiction for the purpose of requiring the imposition and application of guide lines comporting with Title I and regulations. (*Ibid.*, pp. A29-A30)

On remand the District Court issued an injunction and judgment (*ibid.*, p. A45) which provided in part:

"1. Ordered and enjoined that when the needs of eligible children require it, special personnel services may be furnished under Title I by the public agency on private as well as public school premises, and further if such special personnel services are furnished public school children during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends. Defendants are enjoined from disapproving any application of a Local educational Agency (LEA) for the grant of Federal Title I ESEA Funds on the basis that such application includes the use of Title I personnel on private school premises during regular school hours."

Footnote continued—

"There is no evidence in this case that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds. Similarly, there is no evidence that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level except those requesting salaried teachers in the nonpublic schools." (Petition for Certiorari, p. A43)

On June 6, 1973, petitioners herein filed in the District Court a notice of appeal to the Court of Appeals from the said injunction and judgment. (*Ibid.*, p. A51)

On July 5, 1973 defendants filed a petition in this Court for a writ of certiorari to the Court of Appeals. On October 15, 1973 the Court granted the petition. On October 25, 1973 the Court of Appeals, on application of the petitioners herein suggesting mootness by reason of the granting of the petition herein, dismissed the appeal from the District Court's injunction and judgment.

PETITIONERS' STATEMENT OF FACTS AND ISSUES

The purpose of the Act is to provide Federal funds to finance programs and projects "which are designed to meet the special educational needs of educationally deprived children * * *." 20 U.S.C. 241e(a)(1). In respect to children in private elementary and secondary schools the requirement is that provision be made "for including special educational services and arrangements * * * in which such children can participate * * *." 20 U.S.C. 241e(a)(2). States are given wide discretion in determining what constitute "special educational services;" the Office of Education of the United States Department of Health, Education and Welfare (hereinafter Office of Education) states only that a "service is special if it responds to an identified, special need of the child." *Title I ESEA Participation of Private School Children: A Handbook for State and Local Officials* (1971) (hereinafter *Handbook*), p. 13. The Regulations cite as illustrative examples (*Handbook* p. 12) "therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services." 45 C.F.R. §116.19 (c).

However, in Missouri, as in most States, it has been found that the most efficient use of the limited amount of Federal funds available under Title I of the Act is in the area of remedial instruction, primarily in reading and secondarily in arithmetic and language skills. In Kansas City, where this action was brought, the services are limited to remedial reading programs. (Court of Appeals Opinion, Pet. for Certiorari p. A9; Transcript of Proceedings in District Court, Vol. III of Appendix in Court of Appeals [hereinafter Tr.] p. 33; Extract from Application of Kansas City School District for Federal Assistance Under Title I, ESEA, Plaintiffs' Ex. 7 in District Court, Vol. III of Appendix in Court of Appeals, annexed hereto as Appendix A, *infra* p. 43) In St. Louis, the remedial programs are in reading, arithmetic and language. (Extract from Application of St. Louis Board of Education, Defendants' Ex. 3 Vol. VI of Appendix in Court of Appeals, annexed hereto as Appendix B, *infra* p. 44)

While there are, of course, some administrative personnel involved in the carrying out of Title I programs, most of the personnel are teachers and teacher aides. (Court of Appeals Opinion, Pet. for Certiorari p. A10) These are regular teachers and teacher aides who may be given additional training for remedial instruction. (Tr. p. 62; *Handbook* p. 34) The teachers and teacher aides must be publicly employed, but, in the case of private school personnel, this may mean little more than that they are paid out of Title I funds. It is permissible, for example, to employ regular private school teachers to perform educational services under a Title I project so long as "they are definitely committed to such a project as an employee of the applicant local educational agency;" it is not necessary for them to become public school employees. (*Handbook* pp. 34-35) Moreover, even where new personnel is employed, it is probable that in many cases the private school

authorities participate actively in their recruitment or approval. Thus, in a careful study of Title I programs in New Jersey conducted by Professor George R. LaNoue of Teachers College, it was found that "in at least one third of the thirty-two districts which assigned teachers to parochial schools, the public school officials conceded in interviews that parochial school authorities had either a veto power over or had actually recruited these Title I employees." (LaNoue, *Church-State Problems in New Jersey: The Implementation of Title I [ESEA] in Sixty Cities*, 22 Rutgers L. Rev. 219, 254 [1968])

Teacher aides paid out of Title I funds may not be used to provide general assistance to a nonpublic school teacher even if the assistance being rendered was intended to free the regular nonpublic school teacher to perform functions with respect to a proper Title I project. The reason for this is that it would constitute aid to the nonpublic school. (*Handbook* p. 36)

The equipment used in conjunction with Title I programs is purchased out of Title I funds. It may be kept on the private school premises even when not in actual use in connection with a Title I project (*Handbook* p. 13), but may not be used for other purposes. (45 C.F.R. §116.20 (a))

The materials used in Title I programs are similarly purchased out of Title I funds, but they may and usually do include materials prepared by the teacher. (See Appendix A, *infra* p. 43; L. Ringler and E. Pedhazur, *An Evaluation of the Corrective Program for Disadvantaged Pupils in Non-Public Schools*, New York Title I Project [1971] p. 3) While Title I funds may not be used for religious instruction or worship, there appears to be nothing in the Regulations or the *Handbook* forbidding Title I teachers to use also books and material regularly used in the private schools.

Under the Act only "educationally deprived children" may participate in Title I programs, but the criteria for determining who qualify under that standard are established by State and local educational agencies. (*Handbook*, p. 2) In Missouri, as generally elsewhere, "educationally deprived children" are defined, at least in respect to remedial instructional programs, as pupils below the established norms in the particular subject. Thus, in Missouri educational deprivation in reading is defined as "[b]elow norm on standardized tests by: 3 months—Primary; 6 months—Intermediate; 9 months—grade 7; below 40th percentile on Reading Readiness Test for Kindergarten." (App. A, *infra* p. 43) As the Court of Appeals noted, the reading retardation may result from the fact that the pupils are of Mexican-American heritage and for that reason require the "special educational services" provided for in the Act. (Pet. for Certiorari p. A15) The educationally deprived children are thus normal children who happen to be slow readers; indeed, the St. Louis Application (App. B, *infra* p. 44) notes that mentally retarded or emotionally disturbed children are not eligible.

The objective of the program, as stated in the Kansas City Application, is to "raise the achievement level in reading by six to fifteen months during eight months of instruction." (*infra* p. 43) This is achieved through the use of smaller classes (e.g., "Rooms of 15", App. B, *infra* p. 44), and somewhat more intensive instruction by regular teachers who have received some additional in-service training, and are assisted by teacher aides. (St. Louis does have a separate Title I program at Lincoln High School providing "a special instructional environment for socially maladjusted students suspended from Title I high schools because of behavior disruptive to other students' learning, poor school attendance and inadequate learning performances." [Application for Lincoln High School, annexed

hereto as Appendix C, *infra* p. 45] However, the program is similarly basically an instructional program with still smaller classes and work-study orientation. *Ibid.*)

We have set forth this statement of the facts to narrow the issues facing this Court. We do not have here any controversy regarding welfare benefits, such as medical or dental care, breakfasts and lunches, or even psychological services for maladjusted children. We are dealing only with what is basically the every-day, regular instruction given in elementary and secondary schools, somewhat intensified for the benefit of slower students. The issue before this Court is whether the Act mandates such tax-financed instruction in religious schools, and if it does whether the mandate is consistent with the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

At the very least, an interpretation of the Act to require assignment of publicly employed personnel to teach in religious schools during regular school hours raises grave constitutional questions. It is a cardinal principle of statutory construction that such an interpretation be avoided unless the challenged statute textually requires it. Nothing in the text of the Act, its legislative history or its practical construction by the Office of Education supports such an interpretation; rather all point to the contrary. Moreover, they indicate clearly that Congress had specifically in mind a possible conflict between the permissive assignment of publicly employed teachers to religious schools and contrary State law, and intended that the State should not forfeit its right to benefits under the Act by its adherence to its own law.

Should we be in error on this point and should the Court interpret the Act as requiring assignment of publicly employed personnel to teach in religious schools during regular school hours, the Act would to that extent violate the Establishment Clause of the First Amendment, as interpreted by the Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), which are indistinguishable from the present case. It would be unconstitutional because (a) it does not, nor can it effectively assure that the governmentally financed teaching will not be utilized to advance religion; (b) any efforts to prevent this will inevitably involve the government in the comprehensive, discriminating and continuing surveillance which the First Amendment forbids; (c) aside from surveillance, administration of the Act so construed necessarily involves the state in continuing and excessive entanglement in religious affairs; and (d) intensification of political divisiveness on religious lines will necessarily result.

ARGUMENT

I.

The Act does not mandate assignment of publicly employed teachers to teach in religious schools during regular school hours.

A. Avoidance of Constitutional Doubts

The threshold question in this case is whether, as held by the Court of Appeals, the Act does mandate assignment of publicly employed teachers to render educational services in religious schools during regular school hours, even where such action would violate contrary State law. In Part II of this brief we argue that such a construction of the Act would render that provision unconstitutional under the Establishment Clause of the First Amendment. Here we urge only that it would at the very least raise grave questions of constitutionality. It is a well-settled principle that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuy Moy*, 241 U.S. 394, 401 (1916). Few principles of law have been so faithfully adhered to by the Court as this one. Literally scores of cases have been decided by the Court wherein it reached a constitutional conclusion through a statutory interpretation which, as the Court has said, was "in the candid service of avoiding a serious constitutional doubt." *United States v. Rumely*, 345 U.S. 41, 47 (1953). To summarize, or even list all these cases would unduly extend the length of this brief, and hence we merely cite in the footnote a representative sample in all of which, as in the present case, a challenge of uncon-

stitutionality under the First Amendment was made to the Court.²

Nothing in the text of the Act, in the legislative history, or in its practical construction by the Office of Education supports the interpretation adopted by the Court of Appeals. Rather all of these point clearly and unambiguously to the directly opposite conclusion.

B. Statutory Text

We can find nothing in the text of the Act which can reasonably be construed as requiring the assignment of publicly employed personnel to teach in religious schools during regular school hours. The only relevant portion is 20 U.S.C. 241e(a) (2) which provides that a State agency shall approve a project proposed by a local agency only if it is determined.

"that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . ."

This provision can hardly be construed as requiring assignment of personnel to serve in private schools. On

2. *Schneider v. Smith*, 390 U.S. 17 (1968); *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Seeger*, 380 U.S. 163 (1965); *Cole v. Young*, 351 U.S. 536 (1956); *Greene v. McElroy*, 360 U.S. 474 (1959); *United States v. Rumely*, 345 U.S. 41 (1953); *Hannegan v. Esquire*, 327 U.S. 146 (1946); *Peters v. Hobby*, 349 U.S. 331 (1955); *Kent v. Dulles*, 357 U.S. 116 (1958); *Welsh v. United States*, 398 U.S. 333 (1970).

the contrary, of the five illustrations of permissible services given in it (dual enrollment, educational radio, educational television, mobile services, mobile equipment) only one, mobile services, may involve sending Title I teachers into private schools.

Even more significant, one of the illustrations, "dual enrollment," means *not* sending teachers into private schools. Under dual enrollment, as explained by the Office of Education, the "private school child, retaining membership in the private school, attends the public school for special educational services on a part-time basis." (*Handbook* p. 11) Moreover, it means not sending teachers into private schools to perform exactly the same "special educational services" which are performed in public schools during regular school hours. In the light of this express provision of the Act we confess that we find it difficult to understand the contrary interpretation of the Court of Appeals.

C. Legislative History

Nor is there anything in the legislative history of the Act that supports such an interpretation. The Reports of both the Senate and House Committees set forth a large number of programs stated to be "illustrative of the many possibilities of use of funds" supplied under the Act. (S. Rep. No. 146, 89th Cong. 1st Session, pp. 10-11; House Rep. No. 143, 89th Cong. 1st Session, pp. 6-7) Among these there are many, if not most, which do not contemplate publicly employed personnel coming on school premises to perform Federally financed services. Illustrative are "Institutes for training teachers in special skills"; "Supplementary instrumental materials"; "Pre-school training programs"; "Instrumental media centers to provide modern equipment and materials"; "Provision of clothing, shoes

and books where necessary"; "Financial assistance to needy high school pupils"; "Mobile learning centers"; "Educational summer camps"; "Arts and crafts programs during summer vacation"; "Work experience programs"; "Field trips for cultural and educational development"; "Book-mobiles—home oriented"; "Afterschool study centers"; "Pre-school pupil transportation."

The crux of the matter can be summarized by the statement in both Reports (S. Rep., p. 9; H. Rep., p. 5) that ["i]t is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts."

D. Administrative Interpretation

The United States Commissioner of Education filed a brief *amicus curiae* in the Court of Appeals urging reversal of the District Court's decision. The District Court's opinion (Pet. for Certiorari pp. A40-A41) states that "[o]mitting all the legal verbiage in this case, the basic issue is very simple. . . . The plaintiffs contend . . . that if the defendants authorize the employment of teachers in the public school during regular school hours, then Title I mandates the employment of teachers in the nonpublic schools on an equitable basis (average expenditure per pupil)."

The plaintiffs contended that it did; the defendants contended to the contrary. It was the only legal issue presented to the Court of Appeals, and it was argued extensively in the briefs of both parties and of all the *amici curiae* other than that of the Commissioner. His brief was strangely silent; it not only did not take a position on it, but did not even discuss it.

Had the Commissioner taken a position on the critical issue in the case, he could hardly have supported the plain-

tiffs' claim, for it has been the position of the Office of Education from the enactment of the statute to the present time that the Act does *not* mandate assignment of publicly employed teachers to teach in private schools during regular school hours. At the very opening of its *Handbook* the Office of Education states:

"In brief and rather simple language, Public Law 89-10 sets forth the provision affecting private school children in Section 105(a) and Section 105(a) (2) of Title I ESEA. Basically the law requires that the local educational agency (LEA) must provide special educational services for educationally deprived children enrolled in private schools. The provision of these services must be consistent with the number of educationally deprived children in the private schools. Title I regulations emphasize this requirement. The law cites several examples of ways these services may be rendered, 'such as dual enrollment, educational radio and television, and mobile educational services and equipment.' *Nowhere is a particular method prescribed or mandated.*" (Emphasis added.)

Not long after the adoption of the Act the attention of the Commissioner of Education was called by then Missouri Senator Edward V. Long to the specific question presented in this case. The Commissioner did not respond, as did the Court of Appeals, that assignment of teachers was mandatory; on the contrary the answering letter, signed by the Assistant Commissioner of Education and dated July 3, 1967, stated:

"This Office is well aware that certain types of arrangements involving private school children which may be legal in some States are not permitted under Missouri Law. *It should be noted, however, that Title*

I does not require that private school children be served through any particular type of arrangement. What is required by sec. 116.19 of the regulations (enclosed) is that genuine opportunities be provided for the participation in Title I services by educationally deprived children attending private schools and that such opportunities be consistent with the number of such children and the nature and extent of their deprivation." (Defendants' Ex. 7, Vol. VII Appendix in Court of Appeals. Emphasis added.)

The Handbook addresses itself to the same problem (pp. 19-20).

"State Constitutions and Statutes

Many State departments of education found severe restrictions with respect to the kind of services that their respective State constitutions and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

- *Dual enrollment may not be allowed.
- *Public school personnel may not perform services on private school premises.
- *Equipment may not be loaned for use on private school premises.
- *Books may not be loaned for use on private school premises.
- *Transportation may not be provided to private school students.

Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

When ESEA was passed in 1965, each State submitted an assurance to the U. S. Office of Education in which the State department of education stated its intention to comply with Title I and its regulations, and the State attorney general declared that the State Board of Education had the authority, under State law, to perform the duties and functions of Title I as required by the Federal law and its regulations. *While State constitutions, laws, and their interpretations limit the options available to provide services to private school students, this fact, in itself, does not relieve the State educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the Federal law and regulations.*

A number of school officials realized that they could not submit the required assurance because of the restrictions applying to private school students which were operative in their States. The impasse was successfully resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed programs.

Other States have proposed legislation which would allow the SEA to administer Title I according to the Federal requirements. *Still others have applied the restrictions of the State to Title I and have relied upon the initiative of school administrators to develop a program that would meet the Federal requirements.*" (Emphasis added.)

What the petitioners herein have done, as the evidence establishes and the District Court found, was to adopt and apply the last listed of the recommendations in the *Handbook* to avoid Federal-State conflict in effectuating the objectives of the Act. But if the Court of Appeals was correct, the *Handbook* should have stated simply that State restrictions must be disregarded.

Finally, we quote the following from the *Handbook* (p. 23):

"Logistics

Not the least of the difficulties in including private school children in Title I activities are the problems of scheduling, transportation, hiring and assignment of personnel, purchase and inventory of equipment, and arrangements for space. In those States in which public school personnel may not perform services on private premises, the difficulties are compounded.

There are no easy solutions to the logistical problems. However, when the legal situation allows several options and good will exists between public and private school representatives, the logistical problem can be solved or reasonably reduced."

If the Court of Appeals was correct, there was a very easy solution to the logistical problems: assign the public school personnel to perform the Title I service on private premises. The fact that the Office of Education did not even suggest this solution appears quite conclusively that it did not deem it a solution permissible under the Act.

E. The Rationale of the Court of Appeals

On what then did the Court of Appeals base its decision that assignment of teachers to religious schools was mandatory under the Act. On no more than the following paragraph in a "Program Guide" issued by the Office of Education:

"The needs of private school children in the eligible areas may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." Commission of Education, Title I Program Guide No. 44, 4.5 (1968). (Emphasis ours.) [Pet. for Certiorari p. A7.]

The Court of Appeals recognized that the sentence which it emphasized is to be found neither in the Act nor in the Regulations. It states:

This guideline is presumably based in part on section 116.18(a) of the regulations which reads:

"(a) Each application by a State or local educational agency for a grant (other than one for a planning project) must propose projects of sufficient size, scope and quality as to give reasonable promise of substantial progress towards meeting the needs of educationally deprived children for whom the projects are intended." 45 C.F.R. §116.18(a) (1972). (*Ibid.*, pp. A7-A8. Emphasis added.)

The Court of Appeals thus leaps from the text of 20 U.S.C. 241(2)(a)(2), which speaks only of "special educational services and arrangements" in which private school "children can participate", to "size, scope and quality" in the Regulations, thence leaps again to "comparable" in the Program Guide, and finally leaps to identical in its own Opinion. "It is not a comparable program," says the Court of Appeals, "to provide only after hour and summer remedial instruction on neutral sites which are open to the needy private school child while offering the same services during regular school hours for deprived public school pupils * * *." (Pet. for Certiorari p. A15)

(The last leap is indeed a great one. It is quite clear that the Program Guide, in referring to "comparability" is speaking in quantitative terms, i.e., attainment "in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children.")

We concede that providing educational services to private school children on private school premises during regular school hours would be more convenient to them than providing the services after school hours. But it is no less true that requiring private school children to travel what may be a long distance to a public school during school hours to receive Title I services may be considerably more inconvenient to them. As the Office of Education notes in speaking of dual enrollment: "Even when the private school is located very close to the public school, there are difficulties in scheduling, space, safety, etc. As distance increases, additional problems of transportation and loss of instructional time are likely to arise." (*Handbook* p. 11)

The Act, in referring to dual enrollment as a permissible means of fulfilling Title I requirements in respect to private school children, did not limit permissibility to dual enrollment programs but, using the term "such as", indicated that dual enrollment programs were merely an example of permissibility. If the inconvenience of dual enrollment does not render such programs noncomparable and hence impermissible, we cannot see how after hours services can be so held.

Our conclusion from the language of the Act, its legislative history and its interpretation and application by the Office of Education is that comparable does not mean identical. We submit that Congress recognized that respect to State laws in effectuating the purposes of the Act might in some cases result in services to private school children which are less convenient than those accorded to public school children, but that Congress felt that this was a necessary and justifiable price for maintaining our traditional standards of federalism, particularly in the field of education.³

We submit, therefore, that the Court of Appeals was in error in interpreting the Act as requiring Title I teachers to serve within private schools during regular school hours if the State assigns them to serve in public schools during those hours.

3. 20 U.S.C.A. §1232a reads as follows: "No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Eighty-first Congress; the Higher Educational Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; the Emergency Schools Aid Act; or the Vocational Educational Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system. . ."

II.

Assignment of publicly employed personnel to teach in religious schools during regular school hours violates the Establishment Clause of the First Amendment.

A. The Indistinguishability of *Lemon-DiCenso*

In *Lemon v. Kurtzman* and *Earley v. DiCenso*, as well as in its *per curiam* affirmance in *Sanders v. Johnson*, 403 U.S. 955 (1971), the Court held unconstitutionally violative of the Establishment Clause differing methods of tax-financing of secular instruction in religious schools. We submit that insofar as the basic constitutional issues are involved these cases are indistinguishable from the present one.

We noted in our Statement of Facts and Issues (*supra*, p. 9) that the Title I financed services at issue in this case are basically every-day regular instruction in subjects such as reading and arithmetic, the same subjects taught in the private schools in the *Lemon-DiCenso-Johnson* cases. (The Pennsylvania statute in *Lemon* limited the program to mathematics, modern foreign languages, physical science and physical education. 403 U.S. at 610.) The only difference between those cases and the present one is that in the former the teachers remained employees of the school whereas in our case they are technically employees of the local educational agency.

The difference, we suggest, is far narrower than appears at first sight and does not reach the constitutional level. In the first place, as we have noted (*supra*, p. 10), under the Act as interpreted and applied by the Office of Education, it is permissible to employ regular private school teachers to perform educational services under Title

I projects so long as "they are definitely committed to such a project as an employee of the applicant local educational agency." There is not much difference between this and the Rhode Island statute in *DiCenso* under which the private school teacher had to first agree in writing "not to teach a course in religion so long as or during such time as he or she receives any salary supplements" from the State. (403 U.S. at 608) Secondly, as the LaNoue study shows (*supra*, p. 11), even where new non-private school personnel are employed, they are often recruited by the private school authorities, and in such circumstances it is more than probable that they will look to the private school authorities as their *de facto* employers. This conclusion is fortified by the fact that in many cases the Title I teachers are assigned to work full time at particular nonpublic schools. (LaNoue, 22 Rutgers L. Rev. at 253; Board of Education of the City of New York, "Guidelines for Supervision of Board of Education Personnel in Non-Public Schools, ESEA Title I Programs," Defendants' Ex. 8, Vol. VII, Appendix in Court of Appeals.)

Finally, and most important, the factors which impelled the holdings in *Lemon-DiCenso-Johnson* and in the succeeding cases of *Levitt v. Committee for Public Education and Religious Liberty*, 93 S. Ct. 2814 (1973), *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955 (1973) and *Sloan v. Lemon*, 93 S. Ct. 2982 (1973), are no less present in the instant case. The remainder of this brief will be devoted to an examination of these factors. Here, we note only that in the case of *Americans United For Separation of Church and State v. Oakey*, 339 F. Supp. 545 (1972), the court, in invalidating a State statute providing for the assignment of public school teachers to serve in private schools, reached the same conclusion. Speaking for the court, Circuit Judge Waterman said:

"It is contended that because all the hiring of instructors and all the buying of teaching materials for the statutorily specified secular subjects is arranged for by the local school districts, there will be but little entanglement between church and state. The actual mechanics of this intrusion by the employees of the school districts into the sectarian schools is not spelled out in the statute. Presumably, the implementation of the plan is left to the school districts themselves. The potential, however, for involvement of the state, through the school districts, in religious affairs is not dispelled by its lack of articulation.

On its face the statute will create within the established hierarchy of parochial school administration a unit of teachers whose loyalties do not run to the school's administration but rather to the superintendent of the school district. The Court pointed out in *Lemon, supra*, at 2113, that, 'Religious authority necessarily pervades the [parochial] school system[s].' Through the state control of teachers in the church schools, government control would become entangled with the existing religious control, and the day-to-day instructional administration would of necessity be the result of close cooperation between the school's administration and the public school district's administration."

Other cases are in accord. *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (1973); *Klinger v. Howlett*, Ill. (1973); *State ex rel. Chambers v. School District No. 10*, 155 Mont. 422, 472 P.2d 1013 (1970); *State ex rel. Public School District v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932).

B. The Purpose-Effect-Entanglement Tests

In *Board of Education v. Allen*, 392 U.S. 236 (1968) the Court held that under the Establishment Clause governmental action may not have either as a purpose or as a primary effect the advancement of religion. In *Lemon-DiCenso* it added as a third element that the action must also not involve excessive governmental entanglement with religion. That decision and its successors indicated that the forbidden entanglement may take the form of (a) surveillance to assure compliance with First Amendment, statutory or administrative prohibitions against use of governmentally financed property or services to advance religion, (b) entanglement in the administration of the governmentally financed project, and (c) political divisiveness on religious lines.

We do not contest the secularity in purpose of the challenged provision of the Act. (20 U.S.C. 241e(a)(2)) We do, however, contend strongly that it cannot pass muster under any of the other elements of the test, specifically, the advancement of religion, surveillance, administrative entanglement, and political-religious divisiveness aspects.

C. Advancement of Religion

In *Nyquist* and *Sloan* the Court made it clear that a law with a primary effect that advances religion violates the Establishment Clause and that it is not necessary to establish that this is *the* or only primary effect. Thus, the fact that in these cases the tuition grants covered only a portion of the parochial school costs, not more than the amount of tuition applicable to the secular aspects of the curriculum, was held not to immunize the statutes from constitutional challenge. (93 S. Ct. at 2972-73)

Moreover, and most important, it is not sufficient to escape invalidation under the Establishment Clause that a particular program may be conducted in such a way as not to advance religion. It is indispensable that the statute itself, or at least the statute taken together with regulations promulgated pursuant thereto, prescribes safeguards adequate to assure that the advancement of religion will not result from its administration. In *Nyquist*, the Court struck down a statute that appropriated public funds to be used for "maintenance and repair" of nonpublic schools in poverty areas, to ensure the pupils' "health, welfare and safety." The statute provided that the per-pupil grants were not to exceed 50% of the average per-pupil cost for equivalent services in the public schools, on the assumption that at least that percentage of the private schools' operations would be devoted to secular instruction. The Court said:

"* * * Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley v. DiCenso*, the companion case to *Lemon v. Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating 'their religious beliefs from their secular educational responsibilities.' 403 U.S., at 619.

"The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assump-

tion that secular teachers under religious discipline can avoid conflicts. The State *must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion * * * *Ibid.* (Emphasis supplied.)

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny * * *." (93 S. Ct. at pp. 2968-69.)

By the emphasis which it supplied to the quotation from the *DiCenso* opinion the *Nyquist* Court showed as clearly as it could that the key to satisfying the non-advancement of religion requirement is not possibility nor probability but certainty. The same principle was the basis for the invalidation in *Levitt* of another New York statute appropriating funds to reimburse nonpublic schools for expenses incurred in conducting State mandated tests and examinations. The Court said:

"The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist*. As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of testing in the total teaching process, *no attempt*

is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon v. Kurtzman*, supra, 403 U.S., at 618. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *Lemon v. Kurtzman*, supra, 403 U.S., at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separate from aid to sectarian activities." (93 S. Ct. at pp. 2818-19. Emphasis added.)

How, in the present case, does the Government or the State agency make "certain, given the Religion Clauses, that subsidized teachers do not inculcate religion"? How can they assure themselves "that the state-supported activity is not used for religious indoctrination?" How can it be certain that Title I equipment will not be used for religious instruction, or that teacher aides will not assist regular religious school teachers in the latter's performance of their duties, or that the Title I teachers themselves will not do so? Statements in the Program Guide (p. 14)

that "[n]o Title I funds may be used for religious worship or instruction" are hardly adequate; similar prohibitions were contained in the Pennsylvania and Rhode Island statutes invalidated in *Lemon-DiCenso*.

Nor can much reliance be placed on the fact that the Title I teachers are technically on the payroll of the local educational agency rather than the school, in view of the fact that they are often recruited by the private school authorities and are assigned to the schools for full time services. As LaNoue noted, "[w]hen a parochial school recruits a teacher and controls her reappointment, it is only a legal technicality that the Board of Education writes her checks." (22 Rutgers L. Rev. at 255) In New York, for example, it was found that considerable pressure was exerted by private school principals for an arrangement whereby the Title I reading teachers would work "in the classroom with regular parochial teachers" so that they would become an "integral part of the school's program." (Ringler and Pedhazur, *supra*, at p. 27)

In *Allen*, the Court upheld the constitutionality of a statute providing for the loan of public school textbooks for use by pupils in nonpublic schools. In the present case, however, much of the material used is teacher-prepared (see *supra* p. 11), so that the situation is closer to that in *Levitt* than in *Allen*. Moreover, the cost of materials represents but a small part of the budget as compared to teachers' salaries (Pet. for Certiorari p. A10), and there is a vast difference between textbooks and teachers' services. As was said in *Lemon*:

"In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that

teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation." (403 U.S. at 617)

In sum, 20 U.S.C. 241e(a)(2) as construed by the Court of Appeals cannot stand because neither it nor the Regulations or other directives, Handbooks or Program Guides issued by the Office of Education assure that Title I services, materials and equipment will not be used for religious instruction or religiously-oriented secular instruction or otherwise to advance religion.

D. Entangling Surveillance

"We * * * recognize," the *Lemon* Court said in language particularly appropriate to the present case, "that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals." (403 U.S. at 619)

How can a State make sure, as it must, that a Title I teacher assigned to serve in a religious school will remain "religiously neutral?" One way perhaps would be not to assign "a dedicated religious person" to teach "in a school affiliated with his or her faith and operated to inculcate its tenets." This, obviously, would be unlawful; it would violate Article VI of the Federal Constitution forbidding

religious tests for public office; it would violate the Establishment and Free Exercise Clauses as interpreted by the Court in *Torcaso v. Watkins*, 367 U.S. 488 (1961); it would violate the Equal Protection Clause of the Fourteenth Amendment; and it would violate Title VII of the Civil Rights Act of 1964.

Writing restrictions into the statute, regulations and guidelines will, as we have noted, simply not do. "Unlike a book," said the Court in *Lemon* (*ibid.*), "a teacher cannot be inspected once so as to determine the extent and intent of his or her personal tenets and subjective acceptance of the limitations imposed by the First Amendment." There is only one way the State can make sure and that is the one given by the Court in *Lemon* (*ibid.*): "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." But that is the way which the *Lemon* Court held is barred by the same First Amendment, for, of course, it means excessive entanglement by the state in the affairs of the church.

It is no answer to say that the same surveillance might be required if the "dedicated religious-person" paid with Title I funds taught in a public school. Aside from the fact that occasions and pressures to inculcate religious values in his or her teaching would be far less, is the more important point that even if this were not so, the Establishment Clause forbids entanglement of the state with religious institutions; it does not forbid entanglement with its own institutions. It is constitutional for the state to maintain surveillance and control over what goes on in public schools and what the teachers do there; it is not constitutional for it to maintain surveillance and control over what goes on in religious schools.

Allen allowed use in parochial schools of textbooks approved for public school use, but, as we have noted, nothing in the Regulations or other directions issued by the Office of Education forbids Title I teachers from using the private schools' regular textbooks in conjunction with their teaching; both the opportunity and the temptation to do so would ever be present. The constitutional infirmity lies not in the failure of the state to prohibit it, but rather in the constant and continuing surveillance necessary to make the prohibition meaningful. The same is true of the use of Title I teacher aides to assist regular teachers when they are not busy with their Title I activities. The Program Guide forbids this, but enforcement would require continuing on the spot policing; periodic written reports to the local educational agency would hardly suffice.

In *Public Funds for Public Schools v. Marburger*, *supra*, the District Court for the District of New Jersey held unconstitutional a State law similar to and patterned after the provisions of the Act at issue in this suit. What the District Court said in that case is no less applicable here:

"The defendants argue that no surveillance would be required to enforce State limitations in the auxiliary program because the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic. Even though this argument is sound, to a degree, a teacher who teaches reading or remedial reading remains a teacher. A teacher's instruction may vary in content or emphasis and is not entirely predictable. A teacher is not a textbook, the contents of which remain constant, as the Court recognized in *Lemon*, stating:

'We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.' *Lemon, supra*, at 617.

"This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and non-ideological subject matter.

Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints." See *Lemon v. Kurtzman, supra*, at 619.

E. Administrative Entanglements

In *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970), the Court warned against "governmental grant programs [which] could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards." For that reason in *Lemon-Di-Censo*, it ruled unconstitutional the Pennsylvania and Rhode Island statutes financing secular teachings in church schools. In the present case, completely aside from the question of surveillance, we cannot see how publicly employed personnel can be assigned to render educational services in religious schools without involving both church and state in sustained administrative relationships. A religious school does not cease to be a religious school when a public school teacher walks in. It remains under the control and direction of the religious authorities and the public school teacher must work out his or her operational relations with them on a continuing and day-to-day basis.

In New York it was found that Title I corrective reading teachers were supervised both by the Title I field supervisors and the principals of the private schools in which they worked. (D. Hittelman, Final Report of an Evaluation of the Corrective Reading Service in Non-Public Schools, July 1972, p. 13.) This is undoubtedly the case in most private schools to which Title I teachers are assigned; indeed, it is difficult to see how it could be otherwise. The New York studies showed further that it was common for the private school principals and other administrative officials to urge greater administrative roles for themselves and more involvement of the Title I teachers in the regular classroom work and with the regular classroom teachers. (J. Justman, An Evaluation of Non-Public School Participation in District Decentralized ESEA Title I Programs, 1970-1971 School Year p. 4.) This, too, must be a common situation.

It really does not matter whether the Title I teacher is subject to the direction and control of his or her supervisor or of the religious school principal or both. The crux of the matter is that there are and must be continuing administrative relationships between church and state, and these bring with them the conflicts and confrontations which the Establishment Clause seeks to prevent. Suppose, for example, that the practice in the religious school is to start or conclude each session with a prayer. What is the teacher's role in these circumstances? Or suppose, as is usually the case, male teachers in Jewish religious schools must keep their heads covered at all times. The public school teacher who comes in is accustomed to teach without wearing his hat. What is he to do? What happens when the school observes a holy day? In New York City, where Title I teachers do serve in religious schools, the Board of Education issued "Guidelines for Supervision of Board of Education Personnel in Nonpublic Schools" (Defendants' Ex. 8, Appendix in Court of Appeals), which seek to meet this and similar problems. They provide (at pp. 3-4) that "On such days, it may be possible for the nonpublic school principal (if the building can remain open) to permit the Title I teacher to work in the school on certain nonteaching assignments." Does this not require "sustained administrative relationships?"

Paragraph 6 of the "Guidelines" is entitled "Nonpublic School Staff Involvement and Communications." It reads in part:

"The principal of the nonpublic school confers with the Title I teachers regarding matters of mutual concern and interest (including facilities, schedules, school regulations and routines, pupil progress, needs and problems), and visits groups for such purposes as obtaining information, and observing the nature and quality of the program.

Frequent communication between the Title I teacher and the classroom teachers is desirable. Matters of mutual interest and concern may include: teacher-pupil relationships, pupil home conditions, pupil progress, needs and problems, class and group work and materials, articulation of their efforts, storage facilities, and utilization of available space."

If this is not sustained administrative relationships and entanglement, we cannot imagine what would be.

The LaNoue study of the New Jersey schools is similarly replete with instances of close and continuing operational relationships between Title I teachers and church school authorities and the problems and conflicts these relationships give rise to. The Office of Education recognizes that these relationships are necessary and inevitable when Title I personnel are assigned to teach in religious schools. The *Handbook* presents many examples, of which the following (from p. 9) is but one:

"Ultimately, the public school agency has legal responsibility to determine the needs of, gather data on, and evaluate the progress of the private school children in Title I activities. These tasks are included among those for which monies may be expended by the LEA. Private school officials and personnel are expected to cooperate with the public school agency in the execution of these tasks."

Religious schools are established and operate in order to inculcate religious values and further the purposes of the sponsoring church. Can it be assumed that in participating in the evaluation of Title I projects the religious school authorities will be completely uninfluenced by the extent to which the operation of the projects and the performance of Title I teachers helped further the school's religious objectives? Two centuries ago, Jefferson in his

great Virginia Statute for Establishing Religious Freedom (12 Henning, Virginia Statutes, 85) noted the danger that the civil magistrate who intrudes his power in the field of opinion "will make his opinion the rule of judgment and approve or condemn the sentiments of others only as they shall share or differ from his own * * *." Is it likely that religious authorities who intrude their powers in the secular field will do less?

In *Walz*, the Court refused to justify tax exemption of churches on the basis of the "good works" they perform since to "give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." (397 U.S. at 674) The instant case presents the converse: it deals with the introduction of religious evaluation and standards as to the worth of particular social welfare programs. The result is the same in both cases—that continuing day-to-day relationship between church and state which the Establishment Clause forbids.

F. Political-Religious Divisiveness

In 1969 Professor Paul Freund remarked sagely that while ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. (Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 [1969].) The truth of that observation was reflected in *Lemon* (403 U.S. at 622-626) and *Nyquist* (91 S. Ct. at 2976-78). We need not repeat

here what was said in those cases. We suggest only that they are no less applicable to the controversy now before this Court and present an additional reason for a determination that assignment of publicly employed personnel to teach in religious schools violates the Establishment Clause of the First Amendment.

CONCLUSION

For the reasons herein set forth the judgment of the Court of Appeals should be reversed and that of the District Court be reinstated.

Respectfully submitted,

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APPENDIX A

APPENDIX A

READING-ELEMENTARY DEVELOPMENTAL

Authors, Douglass, Faxon, Franklin, Garrison, Karnes, Phillips, Switzer,
Washington, Woodland, and Yates

Number of hours per week children will participate in this activity

Public Schools	Non-Public Schools	Not Enrolled in any School	Institutions for Delinquents	Institutions for Retarded
2-5 hrs.				

Describe briefly how eligible children (public, non-public, institution, out of school) will participate in this activity. (Include length of instructional period, average size of classes, number of periods per week, and methods of instruction used.)

A reading specialist will assist classroom teachers in daily developmental reading instruction and provide corrective or remedial reading instruction in groups of four to ten on a regularly scheduled basis. Programmed reading texts plus a variety of supplementary materials combined with pupils' creative writing and teacher-made materials will be utilized to extend and strengthen reading skills.

On the job training in developmental reading skills will be provided for the teachers.

Degree of educational deprivation necessary for participation

Below norm on standardized tests by: 3 months--Primary; 6 months--Intermediate; 9 months--grade 7; below 40th percentile on Reading Readiness Test for Kindergarten

Objectives To raise the achievement level in reading by six to fifteen months during eight months of instruction.

Methods of Evaluation Standardized tests, pupil goal setting, progress records, teacher observation, checklist, mastery tests

APPENDIX B

APPENDIX B

Activity Description

Location of activity (school facilities to be used)

See attached.

Number of hours per week children will participate in this activity

PUBLIC SCHOOL	NON-PUBLIC SCHOOL	NOT ENROLLED IN ANY SCHOOL	INSTITUTIONS FOR DELINQUENTS	INSTITUTIONS FOR RETARDED
30 hrs.	NA	NA	NA	NA

Describe briefly how eligible children (public, non-public, institution, out of school) will participate in this activity. (Include length of instructional period, average size of classes, number of periods per week, and methods of instruction used.)

The Rooms of 15 are primary and middle grade classrooms with a maximum enrollment of 15 pupils each. Eligible students are those who are retarded in the basic skills of reading, language and arithmetic (as defined in Part 1A in the project application and not eligible for classes for the mentally retarded, (IQ must be 80 or above) or emotionally disturbed. Students will attend classes on a full-time basis (6 hours a day). Instructional emphasis is placed on the basic skills with remediation in areas of academic deficiencies. Teachers use a flexible curriculum designed to meet the unique needs of their pupils, and provide a variety of relevant, interesting and stimulating instructional materials and learning experiences for the various ability levels of the pupils. Additional assistance is provided for pupils through supportive services.

Degree of educational deprivation necessary for participation.

The minimum requirements will conform to the state standards for educational deprivation. In the upper primary and in the middle and upper grades, priority will be given to students with 10 months or more deprivation.

Objectives See attached.

Methods of Evaluation One group design using pre-test and/or post-test scores on the project group to compare observed performance with local, state, or national norms.

APPENDIX C

APPENDIX C

Description

Location of activity (school facilities to be used)

Lincoln High School

5017 Washington Avenue

Number of hours per week children will participate in this activity

PUBLIC SCHOOL	NON-PUBLIC SCHOOL	NOT ENROLLED IN ANY SCHOOL	INSTITUTIONS FOR DELINQUENTS	INSTITUTIONS FOR SELECTED
30 hrs.	NA	NA	NA	NA

Describe briefly how eligible children (public, non-public, institution, out of school) will participate in this activity. (Include length of instructional period, average size of classes, number of periods per week, and methods of instruction used.)

This school provides a special instructional environment for socially maladjusted students suspended from Title I high schools because of behavior disruptive to other students' learning, poor school attendance and inadequate learning performances. Lincoln has a 6-hour day schedule designed to meet the academic and social needs of pupils through a flexible curriculum and individualized instruction. Classes are limited to 12 students each, and are homogeneous in regard to academic achievement of pupils. Curriculum includes academic, art, home economics, industrial arts, and business education courses. The work-study aspect of the program provides for part-time classes and part-time employment. Supplementary supportive services provide additional assistance for solving pupil problems.

Degree of educational deprivation necessary for participation.

Educational deprivation will be determined by a pupil's inability to continue

this education in the regular school setting because of learning and adjustment

problems.

Objectives: To reduce absenteeism by 20%. To show a significant improvement in student achievement following Lincoln as measured by statistical tests of difference. To decrease the number of students referred to community services. To improve employer evaluations of students working as part of their school program from satisfactory to good.

Methods of Evaluation One group design using pre-test and/or post-test scores on the

subject group to compare observed performance with local, state, or national norms;

and descriptive statistics on students.

NOV 29 1973

MICHAEL ROSAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, et al.,
Petitioners,

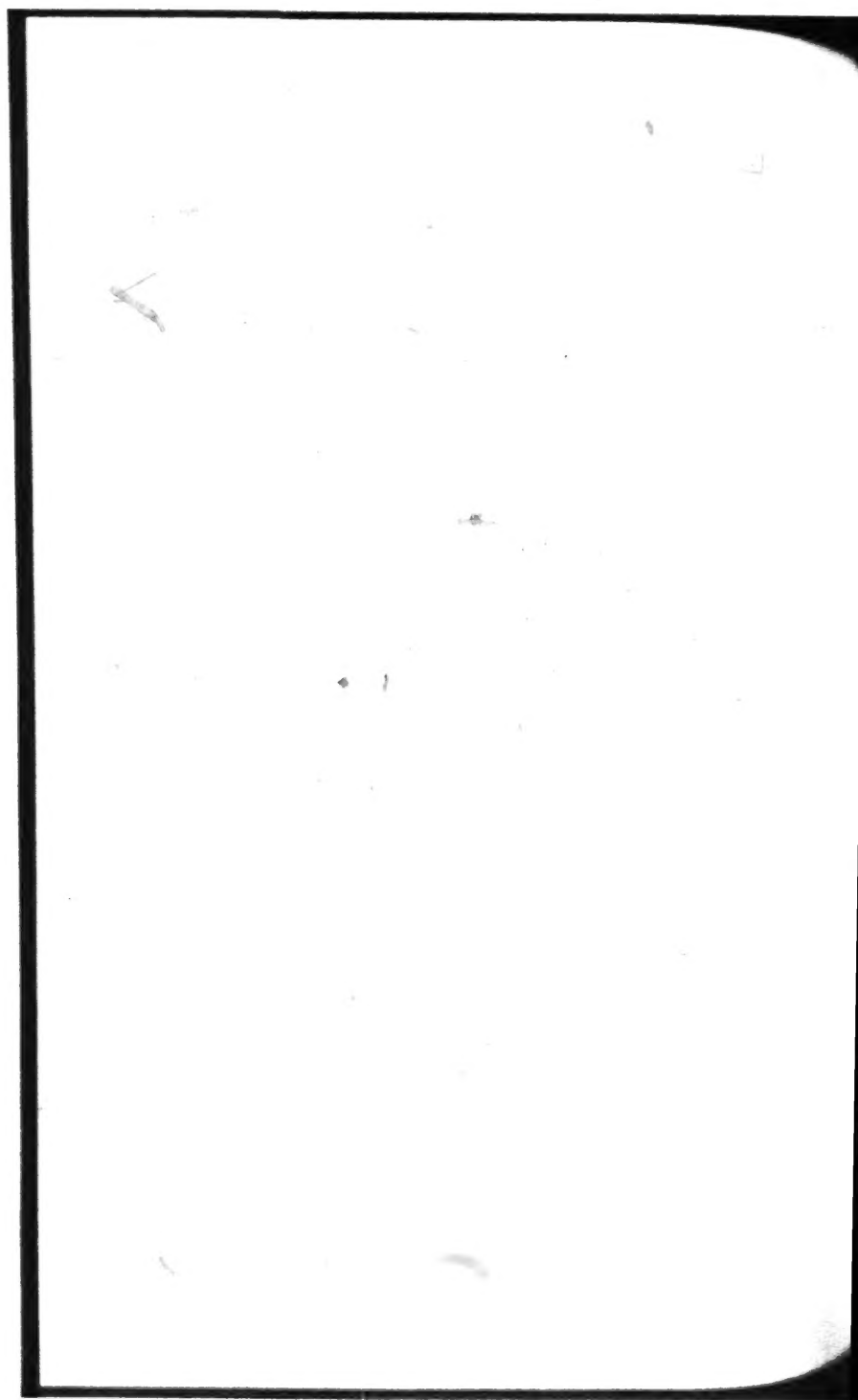
VS.

ANNA BARRERA, et al.,
Respondents.

**ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**AMICUS CURIAE BRIEF OF MISSOURI
COALITION FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY**

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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HUBERT WHEELER, et al.,

Petitioners,

VS.

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Respondents.

**ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

AMICUS CURIAE BRIEF OF MISSOURI COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

IDENTIFICATION AND INTEREST OF AMICUS

Amicus curiae Missouri Coalition for Public Education and Religious Liberty is a not-for-profit organization incorporated under the laws of the State of Missouri. This

Coalition has two basic purposes: (1) To promote a system of public education that is open to all without respect to race, religion, creed, color or national origin and (2) to preserve religious liberty and related rights guaranteed by the Constitutions of the United States and State of Missouri. Where laws threaten either or both of these purposes, amicus believes, it is appropriate for the Coalition, to the extent its resources will permit, to present its views to the judiciary for its review.

The Coalition has two kinds of members: individual and organizational. Individual members are citizens—in each case, taxpayers, to the best of our knowledge—who share the Coalition's purposes. Organizational members are groups which also share these purposes and which choose to work together in support of them. Organizational members include religious, educational, libertarian, and other bodies. For illustrative purposes, we identify a few organizations, which are representative of others: American Civil Liberties Union of Western Missouri, American Jewish Congress of the Southwest Region (St. Louis), Americans United for Separation of Church and State (Kansas City and St. Louis chapters), Christian Life Commission of the Missouri Baptist Convention, Missouri Association of Elementary School Principals, Missouri Congress of Parents and Teachers, Missouri School Boards Association, and Reorganized Church of Jesus Christ of Latter Day Saints. Though the Coalition's members may hold varying religious, philosophical, ethical, economic, and political views, they are in basic agreement in respect to public education's important place in American society and to the importance of First Amendment principles to American government, religion, and society.

STATEMENT OF FACTS AND QUESTIONS

Amicus accepts the statement of facts made by the United States Court of Appeals for the Eighth Circuit (hereinafter appellate court). *Barrera v. Wheeler*, 475 F. 2d 1338, 1340-1342 (1973). Amicus has carefully read the injunction and judgment issued on May 9, 1973, by the United States District Court for the Western District of Missouri, Western Division (hereinafter trial court) in compliance with the appellate court's mandate. Amicus believes that the statement of the case in the petition for writ of certiorari is accurate. Petition for Writ of Certiorari, at 447 (filed July 5, 1973).

Amicus respectfully suggests that the issue, phrased in petitioners' questions, may be clarified as several questions: Does Federal law mandate what the trial court orders? Does Federal law establish the principle of comparability and, in light of Federal law's prohibition of Federal control, require each state to apply it to services and delivery thereof to parochial and private school students? Do the constitution, law, and case law of the State of Missouri authorize said principle of comparability? Would the trial court's order aid parochial and private schools in any way? Do the procedures mandated by the trial court necessitate administrative entanglement between agents of State and Church? Does the trial court's order carry a potential for continuing political controversy and division along religious lines? In answer to said questions, amicus respectfully offers the following arguments.

ARGUMENTS

1. The Elementary and Secondary Education Act of 1965 does not mandate the delivery of Title I services which the District Court ordered.

The trial court has ordered that public school personnel services financed by Title I funds must be sent into parochial and private schools during regular school hours if such services are provided in public schools during said hours.

The Federal courts which have reviewed the evidence in this case to date have found, *without exception*, that the Elementary and Secondary Education Act of 1965 (hereinafter ESEA) does *not* mandate any particular Title I service and/or delivery thereof.¹

-
1. In its June 2, 1972 ruling the District Court said:

"The [Barrera] plaintiffs contend . . . that if the [Wheeler] defendants authorize the employment of teachers in public schools during regular school hours, then Title I mandates the employment of teachers in the non-public schools on an equitable basis (average expenditure per pupil).

"Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill." (Emphasis added).

In its March 16, 1973 majority opinion the United States Circuit Court of Appeals for the Eighth Circuit said:

"We . . . observe that no particular program, curriculum or service is mandatory under the Act. S. Rep. No. 146, 89th Cong., 1st Sess. 11 (1965); 111 Cong. Rec. 7298 (1965) (remarks by Senator Morse)." *Barrera v. Wheeler*, 475 F. 2d 1338, 1354 (1973).

In his dissenting opinion Judge Stephenson said:

". . . Title I of the Elementary and Secondary School Act clearly *only permits* and does not mandate assignment of

(Continued on following page)

Neither ESEA nor its regulations mandate(s) sending public school teachers into nonpublic schools. First, sending Title I-funded teachers into nonpublic schools is *not* among the optional "special educational services and arrangements" listed in a parenthesis of ESEA of 1965 or subsequent revisions. Sec. 205 (a) (2) of P. L. 89-10; 20 U.S.C.A. §241e (a) (2). Second, though regulations of the U. S. Office of Education (hereinafter USOE) mention the possibility of sending public school teachers into parochial and private schools, the language is exceedingly guarded, and certainly it does not say that public school personnel must be made available on parochial school premises during regular school hours:

"Public school personnel *may* be made available on other than public school facilities *only to the extent necessary* to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and *only when such services are not normally provided by the private school.*" 45 C.F.R. §116.19(e). (Emphasis added).

Footnote continued—

public school teachers to private schools during regular school hours. That no such congressional purpose ever prevailed is evidenced by the Act's legislative history. The bill's floor manager in the House initially expressed the view that a public school teacher could not be assigned to a private school under the provisions of Title I. Following lengthy debate a compromise was carefully reached by which "The decision about the best arrangement for providing special educational assistance under Title I is left to the public education agency of the school district, under the Constitution and laws of the State." 111 Cong. Rec. 5979 (1965). . . . the Act is only permissive with respect to school teacher assignments . . ." *Ibid.*, at 1359. (Judge Stephenson's emphasis).

Terms like "may," "only to the extent necessary," and "only when" do not support the mandate issued by the trial court.

Therefore, the trial court's order goes far beyond anything authorized or contemplated by ESEA or regulations promulgated thereunder as construed by all Federal courts to date with the exception of the majority opinion of the appellate court.

Should Federal courts mandate Federally-financed educational services and delivery systems which ESEA neither mandates nor mentions? Amicus respectfully suggests that they should not, for such mandate would impose a judicial order where a statute is silent. Even if it be contended that Federal regulations expand ESEA and clarify the statute's silence (which argument amicus regards as unpersuasive), it must still be emphasized that Federal regulations only make personnel services and delivery thereof permissive, not mandatory. What is optional cannot be made obligatory without nullifying the principle of optionality. What is, at best, only permissive in some states, amicus suggests, should not be made mandatory in all states, including Missouri, without transgressing ESEA's clear impediment to Federalization of education.

2. The Elementary and Secondary Education Act clearly contemplates the furnishing, of personnel services in public schools during regular school hours, but it does not specify the principle of comparability which requires that teacher services made available on public school premises during regular school hours must also be furnished on parochial and private school premises during the same hours.

ESEA and legislative history thereon, amicus suggests, clearly show that Congress contemplated that Title I funds would be used to assist the public school districts or "local

educational agencies" (hereinafter LEAs) in expanding and improving their educational programs, which necessarily entail the use of personnel. However, neither ESEA nor legislative history support the principle of comparability implicit in the trial court's order—to wit, that personnel services provided in public schools must also be provided in parochial and private schools.

In its declaration of policy, Congress made it clear that ESEA was designed "to provide financial assistance" to LEAs to enable them "to expand and improve their educational programs . . . which contribute particularly to meeting the special educational needs of educationally deprived children" (i. e., children residing where there are concentrations of low-income families). 20 U.S.C.A. §241a. (Emphasis added).

LEAs are obviously engaged in providing personnel services on public school premises during regular school hours. Congress intended to assist them in doing better what they were already doing and, of course, in adding to their programs. Congress contemplated that personnel services would be provided on public school premises during the regular school day, as appears in the list of illustrative services and methods contained in House Report No. 143, 89th Cong., 1st Sess. (1965), made by the House Committee on Education and Labor:

"Additional teaching personnel to reduce class size.

Teacher aides and instructional secretaries.

Supervisory personnel and full-time specialists for improvement of instruction and to provide related pupil services.

. . . .

Classes for talented elementary students.

. . . .

Special classes for physically handicapped, disturbed, and socially maladjusted children.

. . .

Remedial programs, especially in reading and mathematics.

. . .

Programmed instruction.

. . .

English programs for non-English-speaking children." *Ibid.*, at 6-7; cf. Senate Report No. 146, 89th Cong., 1st Sess. (1965), at 10-11.

Most of the services and methods listed above appear toward the top of the committee's list. Five of the first eleven in the list imply personnel services in public schools, three others of these eleven relate to teacher training, and another relates to consultants "for improvement of program." After listing forty-nine methods, each of them optional, the committee said:

"The above enumeration is not intended in any way to limit the possible use of funds by the local [public] school district in improving public elementary and secondary education. However, the listing is illustrative of the many possibilities for uses of funds which are already being considered and conducted by educators." H. Report No. 143, at 7. (Emphasis added).

Public schools use teacher personnel to provide public education during regular school hours. Obviously, Congress intended for LEAs to use Title I funds for services and methods of their choosing, including personnel services.

ESEA clearly differentiates between public and non-public schools in respect to education. Congress's declared policy is that ESEA shall assist LEAs or public schools

The House committee's language, quoted below, can only mean that the committee did not contemplate that Title I funds would have to finance personnel services in parochial and private schools comparable to such services in public schools. Following its enumeration of forty-nine optional services or methods, some of which may include nonpublic school students, the committee said:

"No provision of the bill authorizes any grant for providing any service to a private institution, but at the same time the bill does contemplate some broadening of public educational programs and services in which elementary and secondary school pupils who are not enrolled in public schools may participate. The extent of the broadened service will reflect the extent that there are educationally disadvantaged pupils who do not attend public school.

The bill does not authorize funds for the payment of private school teachers. Nor does it authorize the purchase of materials or equipment or the construction of facilities for private schools. However, consistent with the number of educationally deprived children in the school district who are enrolled in nonpublic elementary and secondary schools, the local educational agency will make provision, under the terms of the bill, for including special educational services and arrangements such as dual enrollment, educational radio and television, educational media centers, and mobile educational services and equipment in which such children can participate.

Thus, the bill does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools.

... Several opportunities are afforded local public educational agencies to meet the special educational needs of elementary and secondary school pupils regardless of whether they are enrolled in public schools [i. e., nonpublic school pupils] through supplementary educational services authorized by Title I such as broadened health services, school breakfasts for poor children, and guidance and counseling." H. Report No. 143, at 7-8. (Emphasis added).

Pursuant to the reports of House and Senate committees, USOE promulgated the following regulation:

"Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities." 45 C.F.R. §116.19(e).

The language in ESEA respecting services for nonpublic school students suggests either teacher services in public schools via such an arrangement as dual enrollment (under which students enrolled in nonpublic schools spend part of their school day in public schools) or non-teacher services on nonpublic school premises. ESEA stipulates that an LEA's application must make

"provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such [private school] children can participate." 20 U.S.C.A. §241e (a) (2).

The legislative history on ESEA provides no basis for the conclusion that ESEA mandates that services provided in public schools must also be provided in parochial and private schools. Rep. Perkins (Ky.), chairman of the subcommittee which drafted the bill, said: "We do not intend to put teachers in private schools, no." 111 Cong. Rec. 5747 (March 24, 1965). When Rep. Goodell (N.Y.) pressed for a clear legislative history indicating that public school teachers may teach on private school premises, Rep. Perkins said:

"My answer is no as to providing any teaching service to a private institution. The key here is the extension of special educational services to deprived children under public auspices and arranged for [sic] supervised and controlled by public authority." *Ibid.*, at 5748.

When Rep. Cahill (N.J.) construed the aid-to-children principle to mean that nonpublic school students "are entitled to the same aid as those who attend public schools" and that the U. S. Commissioner of Education would have responsibility "to see that that purpose is carried out," Rep. Perkins said:

"I cannot agree with that statement. First, administration and approval of local school district plans and conformance rests with the State educational agency" [hereinafter SEA]. *Ibid.*, at 5743.

Rep. Cahill observed that an LEA could use Title I funds to provide "additional teachers in order to reduce a very large classroom population," and he asked: "If they do this for the public schools, must they also do this for the private schools?" Rep. Perkins replied: "They cannot send a public school teacher into a private school. That is not the intent of the bill." *Ibid.*, at 5743.

Under persistent debate by congressmen who wanted parochial school pupils to share equally in ESEA benefits, Rep. Perkins eventually conceded that ESEA, if State constitution and law so authorized and an LEA so chose, would permit limited special personnel services (such as guidance and counseling) to be provided in nonpublic schools, such instances being "very rare." *Ibid.*, at 5746.

The Senate Committee on Labor and Public Welfare, Senator Morse (Oregon) reporting, also indicated that it was not contemplated that Title I services would be accommodated to the setting of parochial education. The committee said:

"Where special arrangements (such as dual enrollment)—are made for the participation of children from private schools, it is the committee's expectation that *the arrangements will be administered in such a manner as to avoid classes which are separated by religious affiliation.*" S. Report No. 146, at 11. (Emphasis added).

Thus, according to Congress's intent, Title I funds are not to finance educational services in classes segregated by religion.

Religious separatism is so characteristic of parochial schools (which serve over ninety-five per cent of nonpublic school pupils in Missouri) that any program of teacher services on parochial school premises would offend the principle that public funds shall not finance classes segregated according to religion.²

2. It should here be noted that USOE has taken great liberties with the Senate committee's clear language. USOE's regulations have restricted the no-religious-segregation principle—perhaps deliberately—to programs conducted in public schools—that is, to dual enrollment programs only. Obviously the phrase

(Continued on following page)

If ESEA is not the source of the concept of comparability implicit in the trial court's order, whence comes the concept? One source is regulations promulgated by USOE; 45 C.F.R. §116.19 (a) which states that nonpublic school children "shall be provided genuine opportunities to participate" in Title I services, and 45 C.F.R. §116.19 (b) which states that the number of nonpublic school children and

"the types of special educational services to be provided for them, *shall be determined . . . on a basis comparable* to that used in providing for the participation in the program by educationally deprived children enrolled in public schools." (Emphasis added).

Another source is the majority ruling of the appellate court that USOE regulations require

"a program for educationally deprived non-public school children that is comparable in quality, scope and opportunity, which may or may not necessarily be equal in dollar expenditures to that provided in the public schools." *Barrera, supra*, at 1344.

Amicus suggests, however, that the concepts of "genuine opportunities" and "basis comparable" as used in 45

Footnote continued—

"special arrangements (such as dual enrollment)" is much more restrictive than the following language in USOE's regulations:

"Any project to be carried out in *public facilities* and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children." 45 C.F.R. §116.19(d). (Emphasis added).

USOE's regulation applies *only* to dual enrollment projects in public schools or facilities. Since public schools are already prohibited from segregating pupils according to religious affiliation, it is pointless for USOE regulations to prohibit religious segregation in Title I projects only if they take place in public school facilities.

C.F.R. §116.19 (a) and (b) are not the same as the concept of comparability implicit in the trial court's order. The court concluded that comparability requires that personnel services for nonpublic school pupils shall be comparable and equitable to services for public school children in respect to place (premise "where the pupil regularly attends") and time ("during regular school hours"). The court ordered that services and activities for eligible nonpublic school students must be "comparable and equitable in quality, scope, and opportunity for participation to those provided to eligible public school pupils similarly situated." USOE regulations merely order that the basis for determining the types of services for nonpublic school children shall be comparable to the basis applying to public school students.

Even if ESEA and USOE regulations should require the principle of comparability implicit in the trial court's order, which amicus does not grant, this principle is too vague to serve as a useful guide. The appellate court noted that

"The analysis of whether the program within the private school is comparable to the public school program lends itself more to the definition of what is not a comparable program rather than what is." *Ibid.*, at 1348.

Amicus suggests that LEAs, SEAs, and USOE will find it no more easy to define comparability than the appellate court did. One—and perhaps the only objective—index to comparability is invalid and inapplicable. "Fair-sharing of funds is not the intent of Title I." *Ibid.*, at 1347. The trial court's order implies that different places (public and nonpublic school premises) and same time (regular school hours) are the decisive determinants of comparable and

equitable personnel services. Amicus suggests that the concept of comparability in the instant case is so vague that it can only encourage arbitrary appraisal.

3. In light of the prohibition against Federal control of federalization of education under the Elementary and Secondary Education Act and in light of the requirement that Title I programs must accommodate State law, it is decisive in the instant case that neither Missouri's Constitution, law, nor case law authorizes the delivery of educational services to non-public school children which the District Court's order would impose.

ESEA explicitly prohibits Federal control or federalization of education.³ USOE recognizes that ESEA forbids Federal control.⁴ If Title I programs are to avoid

3. This prohibition appears in Sec. 604 of P. L. 89-10 (ESEA of 1965), as quoted in *Barrera, supra*, at 1351, n. 22. Congress has subsequently reaffirmed the prohibition against Federal control, the present statutory wording being as follows:

"No provision of . . . the Elementary and Secondary Education Act of 1965 . . . shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . ." 20 U.S.C.A. §1232a, 1973 pocket part.

4. One of USOE's early publications says: "Federal control of any aspect of education at any level . . . is prohibited." *Guidelines: Special Programs for Educationally Deprived Children*, ESEA of 1965/Title I, OE-35079, at 1; see Exhibit No. 2 (Form OE-4315) for evidence that "State policies, requirements, or standards" apply to ways determining how nonpublic school children may be included. To the best of amicus's knowledge, USOE has never claimed that its administrative power permits it to determine what educational services are to be provided by an LEA or how they are to be delivered. USOE has no enforcement power except the power to withhold funds. *Lopez v. Luginbill*, ____ F. 2d ____ (10th Cir., August 28, 1973).

Federal control, they must be consistent with State constitutional and statutory provisions.⁵

The prohibition against Federal control must necessarily include the services which a state will provide non-public school children and the way it will deliver these services. Federalization of education will be the inevitable effect of any mandate that, where Federal funds are involved, a state must provide nonpublic school pupils with comparable and equitable personnel services available to public school students.

In light of ESEA's prohibition against Federal control and its requirement that Title I programs must accommodate State law, it is pertinent to cite Missouri's Constitution, case law, and statutes respecting (1) the principle of comparability as it applies to parochial and private school pupils and (2) sending public school personnel into non-public schools to provide special educational services comparable to these available in public schools during regular school hours.

The inescapable conclusion is that the State of Missouri's legal framework provides no—absolutely no—basis for what the trial court's order would impose.

Amicus respectfully calls attention to Missouri's affirmative constitutional principle that the State and its

5. Rejecting the argument that, because of conflict between Federal and State laws, "the supremacy requirements dictate that federal law controls" on Title I matters, the appellate court said:

"This approach . . . substantially ignores the legislative history of Title I which establishes that state policy and law shall govern the administration of these programs. Moreover, Congress has emphatically declared in the act that federal control of programming, instruction and curriculum was prohibited, and the Commissioner of Education has continually recognized that the grants under Title I must accommodate state law." *Barrera, supra*, at 1351.

political subdivisions (including LEAs) shall establish and maintain public schools and education. The State legislature shall establish and maintain free public schools (Mo. Const., Art. IX, Sec. 1). At least one-fourth of the money in the State's general fund shall go to the public school fund (Art. IX, Sec. 3). This fund and other funds for public school purposes shall be used to establish and maintain public schools "and for no other uses or purposes whatsoever" (Art. IX, Sec. 5). The legislature shall appropriate funds from the State treasury "for the purpose of public education" (Art. III, Sec. 36) —and presumably not for the purpose of nonpublic education or educational services in nonpublic schools.

Missouri's SEA and LEAs, subject to the foregoing provisions, are justified in accepting Federal funds which, according to ESEA, are designed to assist LEAs (public schools) in expanding and improving their special programs to serve educationally deprived students. The stated purpose of ESEA—at 20 U.S.C.A. §241a—is compatible with the State of Missouri's affirmative policy of establishing public schools and providing educational—including personnel—services in public schools and under public school auspices.

Amicus also calls attention to Missouri's negative constitutional principle that neither the State nor any of its political subdivisions (including ESEAs) shall provide direct or indirect aid (Art. I, Sec. 7) to religion, its education, or its schools; no payment shall be made "from any public fund whatever . . . in aid of any religious creed, church or sectarian purpose, or to help to support or sustain" any church-controlled school of any kind at any level of education (Art. IX, Sec. 8).

Missouri's Supreme Court ruled, after the enactment of ESEA, that the State constitution prohibits the use of

public funds to send public school teachers into nonpublic schools to provide special educational services during regular school hours, for this method does not establish and maintain public schools. *Special District v. Wheeler*, 408 S. W. 2d 60 (Mo., 1966). Specifically, the State court ruled against the two methods which *Barrera* plaintiffs contended are the only two methods for providing comparable and equitable teacher services for parochial school students—shared-time and on-premises methods.⁶ Plaintiffs' Brief before trial court, at 40-41. The appellate court interpreted the *Special District* ruling to mean that

"dual enrollment is presently unlawful in Missouri by statutory interpretation and the use of 'public monies' for sending public teachers into private schools for specialized instruction has been forbidden by state constitutional provisions." *Barrera, supra*, at 1350. (Emphasis added).

6. The Missouri Supreme Court described two challenged special education practices as follows:

"During the 1963-64 school year, the Special [public school] District provided speech therapy to parochial school children by sending its speech teachers (clinicians) into the parochial schools. . . .

During the 1964-65 school year the Special District changed its program and provided speech therapy for parochial school children in buildings maintained by the Special District. Parochial school children who desired such therapy were released from the parochial schools for part of their regular six-hour school day." *Special District, supra*, at 62.

About the 1963-64 practice the court said:

"Is the use of public school moneys to send speech teachers of the Special District into the parochial schools for speech therapy a use for the purpose of maintaining free public schools? We think not. The use of public school funds for the education of pupils in parochial schools is not for the purpose of maintaining free public schools. We hold the 1963-64 practice unlawful and invalid." *Ibid.*, at 63.

The court ruled against the 1964-65 practice on the grounds that Missouri's compulsory attendance and school-day statutes do not permit dual enrollment.

Amicus calls this Court's notice to the fact that Missouri's General Assembly has repeatedly defeated bills to establish special educational procedures which the Special District decision overturned. In 1967 the chief emphasis was on the dual enrollment procedure; the defeated bill was House Bill No. 24, 74th General Assembly, Reg. Sess. After the U. S. Supreme Court's ruling in *Board of Education v. Allen*, 392 U. S. 236 (1968), the emphasis shifted to an on-premises method like that mandated in the trial court's order now at bar. The following bills, all of which the Missouri General Assembly refused to enact, would have authorized the use of "general revenue" to send public school special education teachers into parochial and private schools during regular school hours: House Bill No. 639 (1969) of the 75th General Assembly, House Bill No. 26 (1971) and Senate Bill No. 532 (1972) of the 76th General Assembly, and House Bill No. 219 (1973) of the 77th General Assembly, which would have established the principle of comparability and the same method of delivery of special educational services that appear in the trial court's order now before this Court.⁷

7. Section 9 (4) of defeated House Bill No. 219 (1973) would have defined services provided on an "equal basis" (comparability) as

"services made available to children enrolled in nonpublic schools shall be as nearly equal as practicable, within the limits of the funds appropriated for the implementation of this act [H. B. 219], to services made available to children enrolled in public schools, i. e. the amount expended per pupil served and the proportion of children given the opportunity to participate in relation to the number of children needing the service shall be as nearly equal as practicable and where services are provided to public school pupils at school premises where they regularly attend, that same service shall be made available to nonpublic school pupils at the school premises they regularly attend. If services are provided to public school pupils during regular school hours, those same services shall also be provided to nonpublic school children during the same hours." (Emphasis added).

The only significant difference between the principle of comparability and method of achieving it as mandated by the trial court and the philosophy and method rejected by the Missouri Supreme Court in *Special District* and/or General Assembly in defeating the aforementioned bills is the identity of the funds from which to finance the services offered.⁸

In early 1970 the Missouri Attorney General came up with another proposal for circumventing the *Special District* ruling. Acknowledging that State funds cannot be used to send public school teachers into parochial schools to provide special education, he nevertheless proposed that Federal funds can be used for this purpose.⁹ Op. Atty.

8. Some Missouri legislators have suggested that a way to circumvent the *Special District* ruling is to finance special educational services from "general revenue" or to prevent the commingling of special educational funds with funds mentioned in Article IX of the Missouri constitution. For example, some 1971-72 bills which employed this circumventing tactic are House Bill No. 26 (sending public school personnel into parochial schools to provide special educational services during regular school hours—the method in the trial court's order in the instant case), House Bill No. 30 (contract for the purchase of parochial schools' so-called "secular" services—the method which this court ruled unconstitutional in *Lemon v. Kurtzman*, 403 U. S. 602 [1971]), and House Bills Nos. 389 and 1385 (tuition reimbursement—the method which this court ruled unconstitutional in *Committee for Public Education and Religious Liberty v. Nyquist*, ____ U. S. ____, 93 S. Ct. 2955 (1973)). House Bill No. 219 of 1973, containing the definition of "equal basis" quoted in note 7 above, also contained the same provisions. The legislature defeated all of the said bills.

9. It is unknown to amicus whether USOE's publicity about an opinion by New York's Attorney General in 1965—Letter, Atty. Gen. Lefkowitz to Commissioner of Education Allen, July 15, 1965—stimulated the Missouri Attorney General to issue his opinion or whether parochial school interests in Missouri urged him to imitate the New York attorney general. For evidence of USOE's publicity, see quotation from the USOE Handbook in *Barrera, supra*, at 1351, n. 23, particularly the paragraph which says:

"A number of [state] school officials realized that they could not submit the required assurance because of the re-
(Continued on following page)

Gen. No. 26, 1-29-70. He held that Congress intended for Title I funds to finance public school personnel in parochial and private schools, that Missouri's laws do not prevent it, and that Federal funds are not public funds, thus immune to Missouri's constitutional provisions.

Amicus suggests that the Missouri Attorney General's opinion is questionable at several points. (1) It ignores ESEA's prohibition against Federal control and its clear intent that Title I programs must comply with State law and concludes that Congress intended that, as necessary and "under certain circumstances" (which the Attorney General made no effort to define or explain), public school personnel would go into nonpublic schools. Op. 26, at 5. (2) It rests on the erroneous assumption that public officials may do anything not expressly forbidden by constitution or statutes; since Missouri school law does not pointedly prohibit the use of Title I funds to send public school personnel into nonpublic schools, the Attorney General implied, the practice is permissible. *Ibid.*, at 6. (3) It suggests that the *Special District* decision is inapplicable to Title I programs for the mere reason that these programs are financed from Federal funds, not from State funds. *Ibid.*, at 7. (4) It curiously holds the Federal funds are not public funds under the meaning of Missouri's

Footnote continued—

strictions applying to private school students which were operative in their States. The impasse was successfully resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed program. [New York]"

The rationale of New York Attorney General's opinion is not applicable to Missouri—for the simple reason that the constitutions of the two states differ. New York's Constitution refers to "money of the state" (Art. VII, Sec. 8) and state property and credit (Art. XI, Sec. 3), but Missouri's Constitution uses more comprehensive terms like "public treasury" (Art. I, Sec. 7), funds for "public school purposes" (Art. IX, Sec. 5) or "public education" (Art. III, Sec. 36), and no "public fund whatever" (Art. IX, Sec. 8).

Constitution and therefore that they are immune to Missouri's constitutional prohibitions. *Ibid.*, at 6. (5) It erroneously interprets a sentence in Article III, Section 38 (a) of Missouri's Constitution as "positive authorization" for using Federal funds to send public school personnel into nonpublic schools because Congress intended it. *Ibid.*

Since the Attorney General's opinion is germane to the issue at bar, amicus respectfully explains why it does not justify the practice mandated by the trial court. Most crucial is the Attorney General's contention that Federal funds are not "public money," an opinion that is erroneous on its face. He based his opinion on an inadequate reading of *State ex rel. St. Louis Police Relief Association v. Igoe et al.*, 107 S. W. 2d 929 (Mo., 1937). The issue in *Igoe* was whether funds which policemen had paid from their own pockets into their own relief fund were private or public money. *Ibid.*, at 630. The court rightly ruled that these were private funds. The court quoted the definition of "public funds" in 50 C. J. 850:

"funds belonging to the state or any county or political subdivision of the state; more especially taxes, customs, moneys, etc., raised by operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose." *Igoe, supra*, at 933.

The Attorney General apparently jumped to the conclusion that, since 50 C. J. 850 did not mention the Federal Government, Federal funds are not public funds.

Any attempt to make a legal distinction between Federal and State monies (*Barrera, supra*, at 1351-2) is fanciful at best, for Missouri's Constitution forbids "the use of 'public monies' for sending public teachers into private schools for specialized instruction" (*ibid.*, at 1350). If

Title I funds are "public monies," as amicus suggests they are, they, because of ESEA's prohibition against Federal control, come under Missouri's constitutional provisions respecting the use of public funds for public educational purposes (Art. III, Sec. 36; Art. IX, Secs. 3 and 5) and prohibiting payments "from any public fund whatever" to aid education in or to help to support or maintain church-controlled schools (Art. IX, Sec. 8). For, if the fact that certain funds given to the State of Missouri or its LEAs for certain educational purposes are Federal funds removes them from the controlling influence of Missouri's Constitution and school laws, Missouri's acceptance of Federal funds will inevitably result in Federal control.

Obviously, Federal funds for Title I programs have all earmarks of public funds under *Corpus Juris's* definition quoted above. They are "raised by operation of some general law" pursuant to Article I, Sec. 8 of the U. S. Constitution. Congress appropriates them "for some public or governmental purpose." ESEA provides that Title I funds are to go to State SEAs and LEAs which operate under State law. USOE makes payments "to each State" to finance LEAs' programs and SEA's administrative functions. 20 U.S.C.A. §241g (a) and (b). USOE regulations require the SEA to "designate the officer who will receive and have custody of funds granted to the State under Title I." 45 C.F.R. §116.31 (e). (Emphasis added). In Missouri Title I funds go into the State treasury and are under the custody of the State Treasurer who has no legal duty unrelated "to the receipt, investment, custody and disbursement of state funds." Mo. Const., Art. IV, Sec. 15. (Emphasis added). It is Congress, not Missouri's General Assembly (as implied in *Barrera, supra*, at 1352), which has specified that Title I funds are to go to the State, granted in trust for the purpose of assisting LEAs "to ex-

pand and improve their educational programs" for the benefit of certain children. 20 U.S.C.A. §241a. The facts that Title I funds are to be used to meet the special educational needs of certain children and that they are not to be commingled with other public funds (as affirmed in *Barrera, supra*, at 1352) do not negate the facts that Title I funds are to go to each State and that they are to be expended for programs accommodated to State Constitution and law. The Missouri Attorney General's opinion to the contrary notwithstanding, Title I or Federal funds are public funds; statutorily granted to the State of Missouri and its LEAs for expenditure under State law, they are subject to Missouri law.

The last sentence of Article III, Section 38 (a), quoted as follows in *Barrera, supra*, at 1353,

"Money or property may also be received from the United States and be redistributed *together with public money of this State* for any public purpose designated by the United States." (Court's emphasis),

does not authorize, amicus respectfully suggests, the use of Title I funds to send public school teachers into parochial and private schools. Amicus suggests several reasons why the quoted sentence does not justify the practice mandated by the trial court's order. (1) The use of the conjunctive "and" indicates that the quoted sentence anticipated programs under which Federal and State funds are *mixed or commingled*. (2) Title I funds are not to be commingled with other public funds or to supplement other funds for educational purposes (45 C.F.R. §116.24; cf. *Barrera, supra*, at 1352), so it is impossible for them to "be redistributed together with public money of this State." (3) Title I programs are financed 100 per cent from Federal funds, so there is no redistribution "together with the

public money of this State." (4) Section 38(a) of Article III of Missouri's Constitution prohibits granting or lending public money or property "to private persons, associations or corporations" except as expressly authorized herein, so it is therefore reasonable to assume that the last sentence of said section deals with the subject of granting or lending of public money or property to *private* interests. (5) There is no indication in the trial court's record, according to our understanding, that this suit deals with granting public money or property to private persons, associations, or corporations; indeed, the record is to the contrary. Plaintiffs want public school teachers under public control to provide publicly-financed services on nonpublic school premises; they are not seeking, as we understand it, to have Title I funds or Federally-financed properties granted to nonpublic school persons, associations, or corporations. (6) The sentence mentions "any public purpose designated by the United States," language which, if at all applicable to Title I, would relate to P. L. 89-10's declaration of policy that the designated public purpose is to assist LEAs to expand and improve their services to meet special educational needs of educationally deprived children. 20 U.S.C.A. §241a.

Amicus respectfully suggests that there is nothing in Missouri's Constitution, statutes, or case law to authorize what the trial court's order would impose on the State of Missouri, such mandate being contrary to ESEA's explicit prohibition against Federal control. If the trial court's order stands, the Federal law's assurance against Federal control will be rendered inoperative, and each State will have to observe the terms set forth in said order. In short, the trial court's order can only result in federalization of education, contrary to assurances given at the time ESEA was enacted and also contrary to the historic tradition that education is reserved to the States or the people under the Tenth Amendment.

4. Since teacher services are inextricably a part of a school's operations, the providing of publicly-financed teachers in parochial schools for any educational services during regular school hours is impermissible aid to the schools themselves.

Common sense confirms the truism that teacher services are intrinsic to the life of any school. Without teaching personnel, a school would have no service to provide children. A school, therefore, must provide teacher services in order to be faithful to its *raison d'être*.

If public funds finance teachers in parochial or private schools during regular school hours, tax funds aid these schools, relieving them of the expense of financing said teachers from private funds. This is the effect regardless of whether such publicly-financed teachers are called public or nonpublic teachers, whether their services are called special or general education, and whether they are technically under public or nonpublic control. Applying the clear logic used by this Court in *Norwood v. Harrison*, ____ U. S. ____ (1973), amicus uses the Court's equally-clear language to suggest that publicly-financed teachers on non-public school premises during regular school hours "are a form of financial assistance inuring to the benefit of the private schools themselves." An inescapable educational cost for schools, whether public or private, is the expense of providing all necessary teacher services. "When . . . that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise" in which the school is engaged. Slip Op., at 8-9. The basic enterprise of parochial schools, because of the permeation of religion throughout said schools' curriculum and operations, is religion-oriented. *Lemon v. Kurtzman*, 403 U. S. 602, 615-619 (1971).

ESEA contains no word suggesting, and certainly nothing requiring, that Title I funds are to finance teacher

services in parochial schools on a basis comparable to such services in public schools. Even congressmen who most ardently supported aid to educational services for parochial school students recognized that Title I funds could not go directly to parochial schools for teacher services, *e.g.*, see comment by Rep. Goodell that private schools are not to get any money under ESEA. 111 Cong. Rec. 5747. A USOE regulation, while permitting limited personnel services "on other than public school premises," specify that such services may be provided "only when such services are not normally provided by the private school."¹⁰ 45 C.F.R. §116.19 (e). This regulation implies what amicus argues—namely, that the so-called aid-to-child principle does not apply to anything for which a parochial school has been assuming financial responsibility. This Court's explanation of the aid-to-child principle implies the same thing, as amicus understands it; if private school students or parents have not been providing textbooks or if private schools have been providing them without direct cost to parents or pupils, the aid-to-child principle would be inapplicable. *Board of Education v. Allen*, *supra*, at 244, n. 6.

There is no essential legal distinction, amicus suggests, between an LEA's giving tax funds to a nonpublic school to finance particular teacher services, on the one hand, and an LEA's sending publicly-financed personnel into non-public schools to provide these particular teacher services, on the other. Any difference is one of means, not of effect.

10. Amicus observes that the trial of this case did not deal with whether or not any parochial or private school in Missouri has normally provided remedial instruction to any student. If it has done so, its students would presumably be excluded from the program contemplated by the trial court's order, according to USOE's regulation. It would entail considerable entanglement for public school officials to have to ascertain in detail what personnel services nonpublic schools have formerly offered before they could comply with the regulation cited. Missouri school law does not authorize public school officials to meddle with private schools in such fashion.

In either case, the effect is to use public funds to provide particular teacher services in nonpublic schools. ESEA funds shall *not* be used to pay salaries "for teachers or other employees of private schools, except for services performed outside their regular hours of duty." 45 C.F.R. §116.19 (e). There is no legal distinction between the use of ESEA funds to pay salaries of personnel of nonpublic schools and the use of such funds to pay salaries of personnel serving in such schools. What cannot be done directly cannot be done indirectly. *Wolman v. Essex*, 342 F. Supp. 399, 412 (1972), *aff'd*, 409 U. S. 808 (1972).

It is unconstitutional under the Establishment Clause for a State to pay even a part (15%) of the salary of a teacher of secular educational services of *and in* parochial schools. *Lemon, supra*. What is invalid for states under the First Amendment is also impermissible for the Federal Government. Amicus respectfully argues that it is unconstitutional to use Title I funds to finance secular teacher services in parochial schools during regular school hours.

5. The District Court's mandate necessitates an intimate, enduring, and excessive entanglement between agents of State and agents of Church, thereby violating the Establishment Clause of the First Amendment.

The trial court's mandate contains two features which necessarily require an administrative entanglement between agents of State and agents of Church: (1) mandatory sending of public school teachers into parochial schools if these teachers provide Title I services in public schools and (2) mandatory inclusion of parochial school officials "in the planning and evaluation of . . . Title I projects at all stages." Injunction and Judgment, points 1 and 4.

In Missouri around ninety-five per cent of all private school students are enrolled in parochial or church-related

schools, and around eighty-eight per cent attend denominational schools fitting this Court's description in *Lemon*, *supra*. Mandating that public school teachers must provide services "on the private school premises where the private school child regularly attends," the trial court necessarily requires public school personnel to do some of their regular work on parochial school premises. In providing that LEA applications under Title I "shall clearly evidence that persons knowledgeable" of private school pupils' needs "have been consulted in the planning and evaluation of . . . Title I projects at all stages," the court requires public school officials to be administratively entangled with parochial school officials and/or teachers.

The Government's post-audit power over parochial schools' books to insure that tax funds finance only secular education in parochial schools involves public officials in "an intimate and continuing relationship between church and state." *Lemon*, *supra*, at 621-622.

The trial court's mandate necessarily requires a more intensive administrative entanglement than that invalidated by *Lemon*. The mandate puts parochial school officials and/or teachers into every stage of Title I programs serving parochial school students. Public school officials (LEA) must consult parochial schoolmen about parochial school pupils' needs, and these parochial school officials must plan and evaluate the programs. Moreover, public school personnel must carry out Title I projects on premises under the control of parochial school officials.

Any way one slices the arrangement mandated by the trial court it comes out as entanglement. If public school officials accept the plans or evaluations suggested by parochial school officials, there is administrative entanglement. If public and parochial school officials work together in planning, conducting, and evaluating Title I

projects involving parochial school pupils, there is close and continuing entanglement.

Pupil school personnel, according to the trial court's order, would have to work closely with, and perhaps under the supervision of, parochial school teachers and/or officials who have court-mandated roles in planning and evaluating Title I projects. These public school personnel would have to satisfy parochial school officials who have a voice in evaluating special educational services.

Among the evils the First Amendment was designed to prevent is public officials' active involvement in religious activities. *Walz v. Tax Commission*, 397 U. S. 664 (1970). No less offensive is ecclesiastical officials' active involvement in the administration of public policy. The no-entanglement test calls "for close scrutiny of the degree of entanglement involved in the relationship" between public and religious institutions. "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon, supra*, at 614.

The trial court's mandate puts public and religious personnel into each other's precincts. Under the mandate, church school personnel must enter into public schools' precincts in planning and evaluating Title I educational projects of the public school district, and public school personnel must enter into church school officials' precincts in providing educational services. It would be difficult to imagine an arrangement more pregnant with entanglement.

6. The District Court's mandate carries a potential of political divisiveness along religious lines, contrary to the First Amendment.

Two principles of the trial court's mandate—comparability and on-premises services—carry the potential of political division along religious lines. If armed with this

Court's approval, they would necessarily encourage an expansion of Federal aid-to-education programs under which (1) taxpayers will be responsible for financing comparable educational services for eligible students regardless of which school they attend (public, parochial, or private) and (2) such services made available on public school premises must also be provided on parochial and private school premises.

The fact that Title I contemplates special educational services, not general education, is of no legal consequence in respect to the principles of comparability and on-premises services. What is special education?

ESEA does not define special education. The law contemplates that ESEA funds will be used to meet "the special educational needs of educationally deprived children" (i. e., children residing where there is a concentration of low-income families), but it also contemplates that these funds will assist local public school districts "to expand and improve their educational programs." 20 U.S.C.A. §241a.

The legislative history shows that Congress made no effort to establish a legal distinction between special and general education. Instead, it left it up to schoolmen to make this differentiation.¹¹

11. The following excerpts from the legislative history are apropos:

"Mr. GOODELL. The question was very simple: Where the local law, the State law and constitution will permit, can a public-school teacher of music, of physical therapy, or of some other subjects—and I would like to know where your boundary is in subjects—teach private-school pupils in a private school? . . . There are a good many people who believe in the private schools and private school pupils getting equal treatment, who think the answer is 'yes.' . . .

Mr. PERKINS. . . . throughout the years there have been people who have endeavored to get a religious contro-
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In the absence of a legal definition of special education, the definition of "special personnel services" as used in the trial court's mandate is imprecise or vague. Thus, because of statutory vagueness, the mandate means that public school agents, administratively entangled with parochial and private school agents, may, insofar as the law's letter is concerned, use Title I funds for anything that they think may meet the special educational needs of educationally

Footnote continued—

versy started. I think the bill is perfectly clear. I cannot visualize a situation anywhere that a local board of education would undertake to put a public-school teacher in a private school for general purposes.

Mr. PUCINSKI. . . . I think that the gentleman from New York is looking for answers that cannot be found in this bill because they are not in the bill. You are raising all kinds of questions about the private schools. This bill outlines very specifically and categorically what the private schools can and cannot do with the money they get from the Federal Government. . . .

Mr. GOODELL. I did not know the private schools were going to get any money from the Federal Government.

Mr. PUCINSKI. That is exactly it. This bill clearly spells out private schools cannot get any direct assistance . . .

What this bill says is a child attending a private school needing additional instruction may get that instruction in a public school institution and for the gentleman to suggest that there is anything in this bill that is going to pour Federal funds directly into a private school is to muddy the waters. . . .

Mr. GOODELL. . . . If the public school officials with Federal money wish to put a public school teacher in a private school to teach any subject, I would like to have a clear legislative history as to whether it is permitted in this bill.

Mr. CAREY. If the gentleman phrases his question 'any subject,' the answer would be 'No,' because that would include all subjects.

Mr. GOODELL. What subjects then would be permitted?

Mr. CAREY. 'Special' is the key word. The gentleman knows that the word 'special' is in the bill. These are special instructional services. Those that are special are not general. We do avoid the whole question. We do not intend to go into the question what would be general instruction because we do not find it in this bill. What is special would be determined by pedagogy." 111 Cong. Rec., at 5747.

deprived (i. e., economically disadvantaged) children and that comparable personnel services shall be provided in both public and nonpublic schools.

Is it proper to define special education as education that is compensatory or supplementary, not substitutionary? ESEA services have been called compensatory. A teacher service that takes the place of another teacher service at a given time would seem to be substitutionary, not supplementary.¹²

12. Since human beings are not ubiquitous, a school child can be in only one place at a given time; a student receiving Title I personnel services during any regular school hour cannot receive any regular personnel services at the same hour. Whereas educators may classify Title I personnel services as compensatory, these services may actually be substitutionary, not supplementary, when provided during regular school hours. To receive Title I personnel services during the regular school day the student has to forego regular personnel services otherwise available to him at the same time. Amicus wonders if the offering of some, perhaps many, Title I personnel services during regular school hours has contributed to the woeful performance under ESEA which President Nixon lamented in his special message to Congress on March 3, 1970. In discussing the educational plight of poor children after four years of ESEA programs, the President said:

"(a) *Compensatory Education.* The most glaring shortcoming in American education today continues to be the lag in essential learning skills in large numbers of children of poor families.

In the last decade, the Government launched a series of ambitious, idealistic, and costly programs for the disadvantaged, based on the assumption that extra resources would equalize learning opportunity and eventually help eliminate poverty.

In some instances, such programs have dramatically improved children's educational achievement. In many cases the programs have provided important auxiliary services such as medical care and improved nutrition. They may also have helped prevent some children from falling even further behind.

However, the best available evidence indicates that most of compensatory education programs have not measurably helped poor children catch up.

Recent findings on the two largest such programs are particularly disturbing. We now spend more than \$1 billion a year for educational programs run under Title I of the

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If this Court arms the trial court's mandate with approval, the precedent will be set for an expansion of Title I programs embracing the principle of comparability and requiring that all Title I personnel services furnished on public school premises during regular school hours must also be provided on church and private school premises during the regular school day.

Since ESEA leaves it up to LEAs to determine what kind of services, including personnel services, to provide, it would take no further legislative action to create a situation in which political pressures from church schools would be set in operation against LEAs. There would be neither statutory nor judicial protection against these pressures. Each LEA would have to involve parochial schoolmen "at all stages" (to use the trial court's phrase) related to Title I programs. In addition to patent entanglement along administrative lines, such a situation is pregnant with the potential of political division along religious lines.

Implicit in the trial court's mandate that an LEA's application "shall clearly evidence that persons knowledgeable of the needs of the private school children have been consulted in the planning and evaluation of such Title I projects at all stages" is the prospect that parochial schoolmen will have veto power over ESEA programs involving both public and nonpublic school children, since comparable services must be provided. The effect of such an arrangement would be to give nominal supervision to public schoolmen but actual control to church schoolmen. To be

Footnote continued—

Elementary and Secondary Education Act. Most of these have stressed the teaching of reading, but before-and-after tests suggest that only 19% of the children in such programs improved their reading significantly; 13% appear to fall behind more than expected; and much more than two-thirds of the children remain unaffected—that is, they continue to fall behind. . . ." 116 Cong. Rec. H1406, S2798-9. (President's emphasis).

sure of a cooperative public school board parochial schoolmen could be expected to seek the election of school board members amenable to parochial schoolmen's desires. Over thirty years ago Missouri's Supreme Court ruled unconstitutional an arrangement under which public school boards serve the educational objectives of church schoolmen, for under such arrangement public school boards would be the center of local political battles along religious lines. *Harfst v. Hoegen*, 163 S. W. 2d 609, 612 (Mo., 1942).

This Court has repeatedly said that the Establishment Clause was designed to prevent the "evil" of political division along religious lines. *Lemon, supra*, at 622; *Committee for Public Education and Religious Liberty v. Nyquist*, _____ U. S. _____, 93 S. Ct. 2955 (1973); *Wolman v. Essex*, 342 F. Supp. 399, 417 (1972), *aff'd*, 409 U. S. 808 (1972).

"... modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support . . . in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance where the 'verge' of the precipice lies." *Lemon, supra*, at 624-625.

The mandate's potential of political divisiveness on religious lines serves as a warning. The State of Missouri

needs no such political divisiveness. Nor does the United States or any state thereof need a Federally-funded educational program made to order for such political division.

One other aspect of this political potential deserves mention. If states may refuse to use tax funds raised by the operation of their own law for sending public school personnel into parochial schools but must use tax funds raised by the operation of Federal law for such purpose, there, it can be expected, will be political pressure at the Federal level to raise the amount of tax dollars expendable under Title I. Church schoolmen would have reason to push for an expansion of Title I, and they could be expected to do so. This Court's ratification of the trial court's mandate could only encourage further political action to make the United States the patron of personnel services in parochial schools, since State constitutional provisions could obstruct the use of State-raised funds for such purpose.

CONCLUSION

Amicus respectfully urges the Court to rule against the concept of comparability and method of delivery of Title I services ordered by the trial court pursuant to the appellate court's mandate because (1) Federal law provides no basis for the mandated delivery system; (2) Federal law contemplated extensive teacher services on public school premises but not on parochial school premises; (3) Federal law forbids Federal control of Title I services and requires that Title I services in Missouri must conform to State law, but the controlling State law provides no basis for the principle and procedure implicit in the trial court's order; (4) publicly-financed teacher services mandated by the trial court would necessarily aid

parochial schools; (5) the involvement of parochial school officials with public school officials in planning and evaluating Title I programs and the performance of public teacher tasks on parochial school premises, as mandated by the trial court, would inevitably foster impermissible administrative entanglement between public and parochial school officials and teachers, and (6) the philosophy and procedure implicit in the trial court's order carry a potential of political division on religious grounds.

Respectfully submitted,

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Copies are being forwarded to attorneys of record for the parties this 28th day of November, 1973.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-62

HUBERT WHEELER, individually and in his capacity
as former Commissioner of Education, *et al.*,

Petitioners,

vs.

ANNA BARRERA, individually and as Next Friend for
JOANNA BARRERA, PATRICIA BARRERA, DIANA BARRERA
and MARIA BARRERA, minors, *et al.*,

Respondents.

**BRIEF OF AMERICAN JEWISH CONGRESS, ANTI-
DEFAMATION LEAGUE OF B'NAI B'RITH, JEWISH
LABOR COMMITTEE, JEWISH WAR VETERANS,
NATIONAL COUNCIL OF JEWISH WOMEN, UNION
OF AMERICAN HEBREW CONGREGATIONS and
UNITED SYNAGOGUE OF AMERICA, *AMICI CURIAE***

This brief *amici curiae* is submitted with the consent of
the parties.

Statement of the Case

This proceeding raises questions concerning the interpretation and constitutionality of a subparagraph of Title I of the Federal Elementary and Secondary Education Act of 1965, 20 U.S.C. 241e(a)(2), which provides for certain benefits for nonpublic schools. Title I (20 U.S.C. 241a ff.) embodies a plan under which Federal funds are granted to local public educational agencies for the purpose of setting up programs to deal with the problems of "educationally deprived children." Paragraph (a)(2) of Section 241e provides that a local educational agency applying for such a grant must show that,

to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *

This suit was initiated in the U. S. District Court for the Western District of Missouri by a group of parents of children attending sectarian nonpublic schools, respondents here, who claimed that they were denied benefits to which they were entitled under the Act. They assert that, although the state educational authorities, petitioners here, have established various remedial and other programs in the public schools paid by Title I funds, they have declined to assign teachers, paid out of Title I funds, to perform the same functions in the church schools which their children attend. Petitioners, conceding the correctness of this allegation, contend (1) that Missouri law forbids assignment of Title I funded teachers to serve in religiously affiliated schools dur-

ing regular school hours; (2) that the state is prepared to and has made programs available to educationally deprived children in nonpublic schools in the form of programs on public school premises outside of regular school hours and during the summer; (3) that such programs constitute compliance with the requirement of Section 241e(a)(2); and (4) that, if that is not the case and the Act does require the assignment of teachers as demanded by respondents, it is to that extent invalid under the Religion Clauses of the First Amendment.

The District Court ruled in favor of the defendants on both the law and the facts. On appeal, the Court of Appeals for the Eighth Circuit, voting 2 to 1, reversed. It found that the refusal to permit Title I funds to be used to send teachers into the parochial schools violated the Act. It held, however, that it was unnecessary to pass on the constitutional question since no specific program was before it. It directed the District Court to enjoin petitioners from further violations.

Petitioners filed a petition for writ of certiorari, presenting both the statutory and the constitutional issue. They urged that the constitutional issue was properly before this Court because the Court of Appeals had in effect required petitioners to carry out a program of sending teachers on the public payroll into the parochial schools. This Court granted the petition.

Question to Which This Brief Is Addressed

Although the undersigned *amici* agree with petitioners that the District Court correctly construed Title I, this brief is addressed solely to the constitutional issue, as stated in the petition for certiorari:

If the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241e(a)(2), requires that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?

Interest of the *Amici*

This brief is submitted in behalf of the following national Jewish organizations:

American Jewish Congress
 Anti-Defamation League of B'nai B'rith
 Jewish Labor Committee
 Jewish War Veterans
 National Council of Jewish Women
 Union of American Hebrew Congregations
 United Synagogue of America

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that the program which respondents seek to effectuate, and which the court below approved, would be a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent. They believe further that the Jewish communi-

ties' close concern with this subject during the past decades enables it to contribute to the resolution of the specific issues before the Court in this case.

Summary of Argument

The decisions of this Court in 1971 and this year regarding governmental aid to sectarian schools establish that the First Amendment prohibits all procedures designed to supply significant amounts of such aid. The present proceeding is but another attempt to find a way around that prohibition. If this Court reaches the constitutional issue in this case, it should make it clear that the procedure invoked here is no more viable than those already condemned.

I. The sending of persons on the public payroll to teach in sectarian schools violates the First Amendment because it has neither a valid secular purpose nor a primary effect which does not advance religion. If it were allowed, there would be no effective limits on the extent to which governments might subsidize parochial schools. This is illustrated by the fact that recently enacted state legislation shows that this procedure is being resorted to widely to permit such subsidies.

A. The procedure in question has a sectarian purpose. Any possible educational purpose could be served by other procedures.

B. The procedure has a sectarian effect since it is a method by which the government can substantially subsidize the operations of sectarian schools.

II. The sending of persons on the public payroll to teach in sectarian schools violates the First Amendment because it fosters an excessive governmental entanglement with religion, both administrative and political.

A. The 1971 decisions of this Court on aid to parochial schools make it clear that, if the procedure here in question were approved, extensive administrative measures would have to be taken to insure that the operations of the teachers in question are entirely secular. In the face of the normal pressures upon those who teach in a religious school to conform to its policies and atmosphere, any such regulations and their administration would have to be so comprehensive as to entail an extreme degree of involvement of government officials in the affairs of the school. Although the teachers in question would be on the public payroll, it is not likely that they would operate as independent enclaves, subject to direction only by absent public officials.

B. The programs before the Court in both the 1971 decisions and the 1973 decisions were found to suffer from the flaw of political entanglement because of their necessary dependence on repeated applications to the legislatures which must make the necessary appropriations. That danger of entanglement exists here.

Argument

The present proceeding represents another effort to bring about large-scale governmental financing of schools maintained by religious institutions as part of their religious mission. It is thus a fresh attempt to overturn a constitutional precept that was taken virtually for granted for more than 150 years after adoption of the First Amendment—that the constitutional requirement of separation of church and state bars such financing. In the words of this Court in *Everson v. Board of Education*, 330 U.S. 1, 16

(1947): "No tax in any amount, large or small, can be levied to support any religious activities or institutions"

In *Lemon v. Kurtzman*, *Earley v. DiCenso*, 403 U.S. 602 (1971), this Court considered and rejected an effort to legitimize such financing by subjecting grants of aid to restrictions designed to assure that the aid went only to the secular aspects of the schools involved. The plans considered in those cases had plainly been devised on the assumption that there was no doubt as to the unconstitutionality of arrangements in which government funds or other benefits were used for the general operation of sectarian schools. It was apparently hoped that the separation requirement could be satisfied by insuring that the funds were not used for general operations. This Court nevertheless held that the plans violated the "entanglement" aspect of the three-way test which this Court has applied in its recent cases. As phrased in *Lemon* (403 U.S. at 612-13), it read:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 647.

With this approach blocked, resort was had to the opposite approach—the simple arrangement of giving religious schools government assistance without strings attached. This meant going back to the general form of financing which the earlier statutes were designed to avoid. That is what was attempted in the statutes which came before this Court at its last term. *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955; *Sloan v. Lemon*, 93 S. Ct. 2982; and *Levitt v. Committee for*

Public Education and Religious Liberty, 93 S. Ct. 2814¹ Reiterating its three-way test (93 S. Ct. at 2965), as well as the broad ruling in the *Everson* decision quoted above (*id.* at 2969), this Court found that that approach was likewise unconstitutional.

In thus closing off both routes around the constitutional barrier to governmental aid to sectarian schools, this Court gave full recognition to the complaint of supporters of such aid that they were faced with an "insoluble paradox." In its opinion in *Sloan*, it said (93 S. Ct. at 2988):

But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: "Congress" and the States by virtue of the Fourteenth Amendment "shall make no law respecting an establishment of religion." With that judgment we are not free to tamper, and while there is "room for play in the joints," *Wale v. Tax Commission*, *supra*, at 669, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

There is nothing surprising about this result. It is merely a reflection of the historic principle that the Constitution bars government from resorting to any device to use its resources to finance religious schools.

In its decision in *Nyquist* (93 S. Ct. at 2959), this Court took occasion to say that it did not regard "Jefferson's metaphoric 'wall of separation' between Church and State" as having "become 'as winding as the famous serpentine wall' he designed for the University of Virginia." It also

1. In the *Sloan* decision, it was noted that the provisions in the Pennsylvania statute there invalidated, which barred the state from supervision of the operations of the affected schools, embodied "an effort to avoid the 'entanglement' problem" (93 S. Ct. at 2985).

noted, at two points in its decisions that, when it upheld the use of state funds to provide transportation to parochial schools in the *Everson* case, it had characterized this arrangement as "approaching the 'verge' of impermissible state aid" (*Nyquist*, 93 S. Ct. at 2966; *Sloan*, *id.* at 2987).² It went on to say (at 2987):

In *Lemon*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial support." * * * Again today we decline to approach or overstep the "precipice" of establishment against which the Religious Clauses protect. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.

With respect to *Everson* and two later decisions upholding the use of public funds for textbooks at parochial schools and construction at church-affiliated colleges (*Board of Education v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971)), it said (93 S. Ct. at 2967):

These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. *But the channel is a narrow one, as the above cases illustrate.* (Emphasis supplied.)

We submit that, if this Court reaches the constitutional issue in this case, it should leave no room for doubt that programs under which teachers on the public payroll give instruction in religiously affiliated schools do not fit into that "narrow" channel.

2. This language from *Everson* was similarly quoted at the beginning and again at the end of this Court's discussion of the constitutional issue in *Lemon*. 403 U.S. at 611-2, 624.

POINT I

If and to the extent that Title I permits or mandates sending personnel whose salaries are paid by the Federal Government to teach in religiously affiliated schools, it violates the Establishment Clause of the First Amendment because it has neither a valid secular purpose nor a primary effect which does not advance religion.

The decision below has the effect of requiring the defendant state school officials (petitioners here) to allow Title I funds to be used to send teachers into sectarian schools to give instruction on the premises of those schools. The Court of Appeals suggested no limitation on what could be taught under this arrangement or how much of the secular aspect of the operations of the affected schools could be thus supported. Hence, what the court mandated is, potentially at least, a procedure that could be used to provide massive government subvention of religious schools. In the words of this Court in *Nyquist* (93 S. Ct. at 2969): "It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny."

The possibilities of this arrangement may be seen in developments in Ohio since this Court's rulings of last June. That state adopted a statute in 1969 under which local school districts were given specified funds to be used to send teachers into parochial and other nonpublic schools. They were to supply what have come to be known as "auxiliary services," including "programs for the enhancement of instruction in secular courses required to be taught in nonpublic schools by minimum standards adopted by the state board of education * * *." Ohio Rev. Code Title 33, Section 3313.06. Thereafter, in December 1971, this statute

was replaced by another which used rather more limited language. It permitted the teachers to be used for various specifically named services, including "programs for the improvement of the educational and cultural status of disadvantaged pupils." *Id.* Section 3317.062. The 1973-74 session of the Ohio General Assembly financed this program in the amount of \$3,259,000. Amended Substitute House Bill No. 86.

Meanwhile, litigation was pending concerning another aspect of Section 3317.062 which provided a program of tax credits for the parents of children in nonpublic schools. On December 29, 1972, a three-judge court held that program unconstitutional. *Kosydar v. Wolman*, 352 F. Supp. 744 (S.D. Oh. 1972). That decision was affirmed by this Court without opinion last June on the same day that it decided the *Nyquist* case. *Grit v. Wolman*, 93 S. Ct. 3062.

Thereupon, the Ohio General Assembly enacted House Bill 993, signed by the Governor on August 15, 1973, which appropriated an additional \$81,456,090 to be used for the auxiliary services aspect of Section 3317.062.

Similar laws have been passed in other states. In New Jersey, a statute which provides a number of forms of aid to nonpublic schools includes grants directly to such schools for "supplies, instructional materials, equipment and auxiliary services * * *." New Jersey Stat. Ann. Title 28A, Sections 58-59 to 58-67. The term "auxiliary services" has administratively been given a rather restricted interpretation but it includes such things as "remedial and corrective instruction and diagnostic services in reading and mathematics." New Jersey Administrative Code, Section 6:8-1.3.

This and other aspects of the New Jersey statute have been found unconstitutional by a three-judge District Court.

Public Funds for Public Schools of New Jersey v. Marburger, — F. Supp. —, decided April 5, 1973 (U.S.D.C. N.J.). Despite the limited nature of the auxiliary services to be offered, the District Court held that the program violated the principles laid down in this Court's 1973 decisions. It found both that the statute had the improper effect of assisting religion and that it created undue entanglement between church and state. An appeal is pending in this Court. See 93 S. Ct. 2728, 3024.

In Illinois, a statute providing auxiliary services included, among other things, "Remedial and therapeutic programs for educationally disadvantaged children. * * *" (Public Act 77-1891). This provision, along with others, was held unconstitutional by the Illinois Supreme Court in *People ex rel. Klinger v. Howlett*, — Ill. —, decided October 1st, 1973.

A statute enacted in Pennsylvania is somewhat broader than the two just described. Pennsylvania Purdon's Stat. Title 24, Section 9-972. The term "auxiliary services" is there defined to include not only guidance, counseling, remedial and therapeutic services, but also "such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Plainly, this language could apply to all secular subjects. The statute has been challenged and the matter is now before a three-judge Federal District Court.

These statutes, and particularly the experience in Ohio, strongly suggest that, in the wake of this Court's decisions of last June, the auxiliary services procedure will be at least one of the devices used in the continuing effort to provide massive governmental financing of sectarian schools.

A. The Sectarian Purpose

In both its 1971 and its 1973 parochial decisions, this Court accepted declarations in the various state statutes before it that their provisions were designed to achieve specific secular purposes (*Lemon* case, 403 U.S. at 613; *Nyquist* case, 93 S. Ct. at 2966; *Sloan* case, 93 S. Ct. at 2985). Accordingly, it found that the statutes met the first part of the three-way test. Nevertheless, at various points in its 1973 opinions, it suggested that the statutes under review had the purpose of assisting religion. In discussing tax credits in *Nyquist*, it said that "their purpose and inevitable effect are to aid and advance * * * religious institutions" (93 S. Ct. at 2976). Again, in *Sloan*, it talked of the "intended consequences" of tuition reimbursement (93 S. Ct. at 2986; see also 2971). Thus, it appears that impermissible intent can be found from the nature of the program itself.

In the present case, there is no statutory declaration of purpose before the Court and it is therefore necessary to deduce the purpose from the program involved. Moreover, the purpose to be considered is not that of Title I generally or even the purpose of that portion of it, subparagraph 241e(a)(2), which requires some form of expenditure in behalf of children at nonpublic schools. It is rather the purpose of the program demanded by the parents of children in sectarian schools (respondents here) that the Federal funds in question be spent in a particular way; namely, by sending teachers into their schools. The purpose of such an arrangement can hardly be other than assisting those religious schools in carrying out their functions and assisting the parents in enabling them to obtain a religious education for their children.

Plainly, the purpose of respondents in demanding this particular arrangement and none other is religious rather than educational. *Education* is available to the children of those parents in the public schools. It is available also under the arrangements for spending Title I funds which the State has made or offered to make—including giving classes in public schools after hours or on Saturday. The reason for demanding that the instruction be given in the religious school is the overriding consideration—important to virtually all religious school authorities—that it is essential to keep the child in the religious atmosphere which they have created. That, however, is a religious, not an educative, value.

B. The Sectarian Effect

The main thrust of this Court's opinions in the 1973 parochiaid cases is that the Constitution prohibits any plan under which the government may "openly subsidize parochial schools" (*Nyquist* case, *supra*). That is the case here. The procedure urged by respondents could be used to subsidize most of the operations of a sectarian school.

The recent decisions also make it clear that the "primary effect" aspect of the three-way test does not mean exclusive or even predominant effect. They leave little room for doubt that a statute cannot be upheld if it has a substantial sectarian effect even though it also has a substantial secular effect. Thus, in *Nyquist*, this Court found it sufficient that the maintenance program had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools" (93 S. Ct. at 2966). This aspect of the ruling was highlighted by Justice White in his dissent where he

pointed out that the various New York programs undoubtedly had as one of their effects "preserving the secular functions" of the church-related schools (93 S. Ct. at 2998).

In sum, we submit that, even if the program of governmental support involved here could be conducted without impermissible entanglement, the point we discuss next, it fails under the secular effect test.

POINT II

If and to the extent that Title I permits or mandates sending personnel whose salaries are paid by the Federal Government to teach in religiously affiliated schools, it violates the Establishment Clause of the First Amendment because it fosters an excessive governmental entanglement with religion, both administrative and political.

A. Administrative Entanglement

The form of aid under review here is not markedly different from that which was condemned by this Court in the *Lemon* decision, particularly the arrangement in effect in Rhode Island under which the government paid part of the salaries of teachers in sectarian schools. Here it would pay the whole salary of teachers who, under the decision of the court below, would be sent to teach in sectarian schools.

In *Lemon*, this Court noted that the legislatures of both Pennsylvania and Rhode Island, recognizing the religious orientation of the schools involved, had created "statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former" (403

U.S. at 613). As to the Rhode Island law, it said that the fact that "parochial schools involve substantial religious activity and purpose" had "led the legislature to provide for careful governmental controls and surveillance by state authorities in order to insure that state aid supports only secular education" (403 U.S. at 616). While Title I does not contain the explicit provisions for "government controls and surveillance" included in the Rhode Island statute, there can be no doubt under the decisions of this Court that such controls would have to be imposed by regulation.

Thus, in *Lemon*, this Court said, concerning the Rhode Island statute there considered (403 U.S. at 619):

The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

Yet it is questionable whether regulations could be drawn that would effectively counter the normal pressures upon those who teach in a school to conform to its policies and atmosphere. To be effective, the regulations and their administration would have to be so comprehensive as to entail an extreme degree of involvement of government officials in the affairs of the school. Indeed, it is this conflict—between the need to attach limitations and the entangling

effect of those limitations once they are attached—that creates the “insoluble paradox” referred to above which has the effect of barring all substantial government aid to sectarian schools.

A key aspect of the *Lemon* decision was its conclusion that it is difficult if not impossible to make sure that any particular teacher is refraining from sectarian activity, particularly in the atmosphere of a sectarian school. Distinguishing the decision in *Board of Education v. Allen*, 392 U.S. 236 (1968), upholding the New York State law under which the state financed the lending of textbooks for use in nonpublic schools, this Court said (403 U.S. at 617) that “teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not.” Hence, the “conflict of functions inheres in the situation.” Noting that teachers in religious schools are under the direct supervision of a church, the Court said: “Religious authority necessarily pervades the school system” (*ibid*). Although a number of teachers had testified that they did not inject religion into their secular classes, the Court believed that the record suggested “the potential if not actual hazards of this form of state aid” (*id.* at 618). It found that the necessary supervision of the work of the teachers “will involve excessive and enduring entanglement between state and church” (*id.* at 619).

One of the factors considered significant by this Court in finding improper entanglement in the Rhode Island arrangement is absent here. The teachers whose salaries are paid out of public funds are, at least presumably, appointed

by public authorities rather than by those who operate the religious schools. Examination of the *Lemon* opinion, we submit, will show that the fact that the teachers were under the authority of the church was but one of a number of factors deemed significant by the Court. At least as important was the general religious atmosphere of the school, an essential aspect of sectarian institutions.

Furthermore, it is not in reason to assume that those responsible for the overall operation of a school, and particularly for its functioning as an agency for inculcation of a particular religion, will refrain altogether from seeking to influence what goes on in the classrooms. It is hardly likely that these Federally financed activities will operate as independent enclaves, subject to direction only by absent public officials. In *Lemon*, this Court pointed to "the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions" (403 U.S. at 619). The same kind of possibility exists here—that of friction over the degree of independence of the teacher.

We submit that there is no way in which this kind of program can be operated without falling afoul of the prohibition of administrative entanglement. And if it could, there would still be the prohibition of political entanglement, to which we now turn.

B. Political Entanglement

As we have seen, the statutes considered by this Court in the 1973 cases were designed so as to avoid if possible the flaw of governmental entanglement which had brought down the statutes considered in 1971. Consequently, the

administrative entanglement aspect of the three-way test did not figure prominently in the 1973 rulings. The political aspect of entanglement was, however, invoked.

In *Nyquist*, having found that all three of the challenged programs had "the impermissible effect of advancing religion," this Court said that it was unnecessary to consider whether they would result in entanglement of the state with religion in the sense of "continuing state surveillance" (93 S. Ct. at 2976). It said, however, that, "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carried grave potential for entanglement in the broader sense of continuing political strife over aid to religion" (*ibid*). The Court (at 2977) referred specifically to its statement in the *Lemon* case (403 U.S. at 623) that:

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow.

The Court noted (93 S. Ct. at 2977-8) that all three of the programs before it "start out at modest levels," but that experience showed that aid programs "tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies * * *. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration."³

3. This factor was found to be applicable even to the tax relief aspect of the New York statute. This Court said that that provision "will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable" (93 S. Ct. at 2977).

The discussion of this aspect of entanglement in the *Lemon* decision follows the discussion of administrative entanglement and starts with a statement that this is a "broader base of entanglement" (403 U.S. at 622). We submit that it is broad enough to include all forms of governmental aid to sectarian schools that involve any substantial amount of expenditure of tax-raised funds. That is surely the case here.

Conclusion

The issue in this case is not whether educationally deprived children attending sectarian schools are entitled to aid under Title I. The Missouri authorities have established remedial and other Title I programs in the public schools in which nonpublic school students can participate. Rather, the issue is whether Title I funds can and must be used to conduct such programs on the premises of sectarian schools.

In its opinion in *Nyquist* (93 S. Ct. at 2971-2), this Court referred to a statement in Justice Black's dissenting opinion in the *Allen* textbook case warning that the majority ruling in *Allen* would be used to justify ever-increasing aid to sectarian schools, including construction of buildings and payment of teachers' salaries. The Court said that subsequent rulings by the Court had kept Justice Black's fears from coming to pass. It then said (at 2972):

But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Justice Black's prophecy.

We respectfully submit that, if this Court reaches the constitutional issue in this proceeding, it should make clear that the Establishment Clause cannot be made to yield to repeated "ingenious" efforts to find ways around its clear language.

Respectfully submitted,

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November, 1973

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, *et al.*, *Petitioners*,
v.
ANNA BARRERA, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**BRIEF FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS AS
AMICUS CURIAE**

This brief is being filed in support of the respondents with the consent of the parties.

QUESTIONS PRESENTED

1. Whether Congress directed in Title I of the Elementary and Secondary Education Act of 1965 that local agencies providing special educational services to disadvantaged children provide equal services to stu-

dents in private sectarian schools as are provided for students in the public schools.

2. Whether implementation of such a standard of equality by sending specialized-service instructors—paid directly by the local agency and responsible only to its officials—onto the premises of private sectarian schools violates the Establishment Clause of the First Amendment.

INTRODUCTION AND INTEREST OF THE AMICUS

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of lawyers and social scientists who volunteer their professional services to assist observant Jews in exercising religious rights. We have appeared in many administrative and judicial forums on behalf of those invoking the right to free exercise of religion under the First Amendment, and have filed *amicus* briefs in this Court in numerous cases involving such rights—irrespective of the particular faith professed by the party before the Court. With great dismay, we have witnessed, over the past several Terms, an increasing rigidity on the part of a Court majority with regard to private-school financing—a rigidity which, we believe, was not contemplated by the draftsmen of the "majestic generalities" of the First Amendment and which conflicts with the realities of our times. The effect of this Court's decisions has been to disable private sectarian education in this country by placing it—virtually alone of all social services offered in our society—beyond the helping hand of the otherwise omnipresent public treasury. We fear that these judicial rulings may strangle private religious education in this nation—thereby seriously jeopardizing the

vitality of the diverse creeds which are the glory of the United States and which demonstrate to free societies everywhere the blessings of liberty.

This case, in our view, may mark another major step along this damaging course. Congress has recognized that many of the disadvantaged children who should be beneficiaries of Title I of the Elementary and Secondary Education Act are enrolled in nonpublic schools, and it has specifically directed that local agencies must give equal participation in any Title I project to those children. This case tests whether the standard of equality, when mandated by Congress, means *real* equality rather than merely adherence to a verbal formulation, and whether the legislative effort to give such meaningful assistance is to be wiped away on the formalistic ground that the Establishment Clause forbids public officials, supervised entirely and paid directly by the secular authority, from entering into and performing their services in a building owned by a sectarian agency and devoted, during part of the day, to sectarian purposes.

The position taken in this brief is supported by the following national Jewish organizations:

Agudath Harabonim,
 Union of Orthodox Rabbis
 Agudath Israel of America
 National Council of Young Israel
 Poalei Agudath Israel of America
 Rabbinical Alliance of America
 Rabbinical Council of America
 Religious Zionists of America
 Torah Umesorah, National Society of
 Hebrew Day Schools
 Union of Orthodox Jewish
 Congregations of America

ARGUMENT

I

The Statute and the Regulations Require Real Equality and Comparability Between the Services Given Public School Students and Those Given to Private Schools

More than two decades ago, this Court was being told by the school authorities of various jurisdictions that black students and white students could be treated equally while they remained separate. The Court rejected that position, finding that there was inherent inequality in the compelled separation. Today, the Court is again being told that what is, almost by definition, unequal is really sufficient to satisfy a legislative and regulatory command of equality and comparability. Students at sectarian schools, the district judge said, "can receive their equitable mathematical share of the funds available in after-school or summer school programs" (Pet. App. A43), even though public school children receive instruction during the regular school day, in their regular classrooms, from special teachers who are qualified to instruct in remedial subjects.

The court of appeals correctly read the statute and the regulations as requiring that the same in-school remedial program be offered to disadvantaged children enrolled in private schools as is given to similarly disadvantaged children in the public schools. The relevant statutory provision, 20 U.S.C. §241e(a), fixes six absolute preconditions to any grant under Title I (as well as five other conditions applicable only to specified types of projects). The second of these preconditions is that the local agency *must* show that it "has made provision" for the participation of eligible children enrolled in nonpublic schools. Although the

statute does not explicitly use an equality or comparability standard, the regulations issued by the Office of Education—by which that agency and all local units are bound—requires that the services for private-school enrollees be “on a basis comparable to that used in providing for the participation in the program by deprived children enrolled in public schools.” 45 C.F.R. §116.19. And the Commissioner of Education’s Program Guide—quoted extensively by the court of appeals (Pet. App. A7)—prescribes that private school “services and activities . . . must be comparable in quality, scope, and opportunity for participation to those provided for public school children . . .”

In short, all the formal pronouncements direct that equality be the touchstone. A summer-school or after-school program (which patently is less effective in capturing the child’s attendance and attention) is plainly not the equivalent of a remedial teacher’s presence and instruction in the child’s regular school building during his regular school day. Accordingly, the court of appeals properly held that the Missouri authorities were required by overriding federal standards to send their remedial teachers and teacher aides into the private schools for comparable instruction if they are to continue to receive Title I funds.

II

The Presence of a Public-School Remedial Teacher, Responsible Only to Secular Authorities, in a Sectarian-School Building to Give Remedial Instruction to Students at the Secretarian School Does Not Violate the Establishment Clause.

The remaining question is whether the Constitution forbids implementation of the legislative and administrative directives that public and private school children be treated equally. The argument that it does is

based principally on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), where this Court invalidated local statutes under which teachers of secular subjects at sectarian schools were paid directly out of state treasuries. The Court's concern in *Lemon* was that teachers who were interviewed, hired and supervised by the religious authorities who operate sectarian schools and who would probably be "dedicated religious" people affiliated with the religion taught at the schools "would find it hard to make a total separation between secular teaching and religious doctrine." 403 U.S. at 617-619. It was this "potential" that led the Court to conclude that tax funds would probably end up being used to inculcate religion—or, if the secular authorities sought to police the instruction to prevent such a phenomenon, the result would be "comprehensive, discriminating, and continuing state surveillance." 403 U.S. at 619.

A program of the kind involved in this case presents no similar dangers. The remedial teachers are on the public payroll, responsible only to the public-school authorities. Not only are they not "dedicated religious" people; they will probably, in most instances, not even be of the same religious faith as the students they are teaching. Nor is there a real possibility that they will gear their instruction to religious tenets since the easiest and most probable approach would be to teach in the sectarian school from the same materials and in the same manner as they teach, contemporaneously, in the public schools.

What similarity, then, remains between the Title I program that would be administered in Missouri (or other jurisdictions) if the decision below were affirmed and the program invalidated in *Lemon*? Only

that both are taught on the sectarian school's premises. But to make a vital constitutional holding—possibly the last life-line of parochial school education in the United States—turn on this ritualistic distinction would be ironic. Does a fireman become a religious functionary if he enters a sectarian school to quench a blaze? Do state health inspectors or nurses infringe First Amendment liberties if they perform health or medical functions on church property? Why should a remedial teacher—whose sole mission is to bring deprived children up to par in secular learning ability—be presumed to be furthering religion if he or she steps into a church school to carry out that function? The building no more contaminates such a teacher than it would a textbook, and here, as in *Board of Education v. Allen*, 392 U.S. 236, 248 (1968), there is no evidence whatever that the facility offered by the state could be “used by the parochial schools to teach religion.”

Americans United for Separation of Church and State v. Oakey, 339 F.Supp. 545 (D. Vt. 1972), is a decision which, to be sure, lends some support to the petitioners' position—although it can be distinguished on the ground that it concerned regular classroom teachers and not remedial instruction. Not to be ignored in that decision, however, is the brief but moving concurrence of Circuit Judge Oakes, who joined the result only because he felt compelled to do so by this Court's ruling in *Lemon*. Judge Oakes expressed concern that “the inevitable result” of these cases would be “the ultimate demise of the parochial school in America.” 339 F.Supp. at 553. He went on to say (*ibid.*):

To me, this would be a most unfortunate result. Ours has been a pluralistic society, fostering creativity out of multiple peoples, religious and philo-

sophical systems of thought, and ethnic ties. Cf. R. Niebuhr, A Note on Pluralism, in *Religion in America* 42 (1958). In the advancement of this pluralistic society, the parochial school system has played a not insignificant part. *Lemon*, I fear, will tend toward a homogenization of American education. . . .

CONCLUSION

The court of appeals was correct in its reading of the statute, and it should have sustained the constitutionality of a remedial education program under which public-school teachers would provide instruction on the premises of sectarian schools. The judgment should be affirmed on the above grounds.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, et al.,
Petitioners,

vs.

ANNA BARRERA, et al.,
Respondents.

RESPONDENTS' BRIEF

JURISDICTION

Respondents contend that no substantial constitutional question has been preserved and presented to this Court.

STATUTES AND REGULATIONS INVOLVED

Title 20, U.S.C. Sec. 241a provides:

"In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to pro-

vide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including pre-school programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Title 20, U.S.C. §241e provides in part:

"(a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—

(1) that payments under this subchapter will be used for programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs and to this end involve an expenditure of not less than \$2,500, except that the State educational agency may with respect to any applicant reduce the \$2,500 requirement if it deter-

mines that it would be impossible, for reasons such as distance or difficulty of travel, for the applicant to join effectively with other local educational agencies for the purpose of meeting the requirement; and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this subchapter: *Provided*, That the amount used for plans for any fiscal year shall not exceed 1 per centum of the maximum amount determined for that agency for that year pursuant to section 241c of this title or \$2,000, whichever is greater;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;

(3) that (A) the local educational agency has provided satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds made available under this subchapter will be so used (i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pu-

pils participating in programs and projects assisted under this subchapter, and (ii) in no case, as to supplant such funds from non-Federal sources, and (C) State and local funds will be used in the district of such agency to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such district which are not receiving funds under this subchapter: *Provided*, That any finding of non-compliance with this clause shall not affect the payment of funds to any local educational agency until the fiscal year beginning July 1, 1972, and *Provided further*, That each local educational agency receiving funds under this subchapter shall report on or before July 1, 1971, and on or before July 1 of each year thereafter with respect to its compliance with this clause; * * *

Title 20, U.S.C. §241f provides in part:

“(a) Any State desiring to participate under this subchapter (except with respect to the program described in section 241e(c) of this title relating to migratory children of migratory agricultural workers) shall submit through its State educational agency to the Commissioner an application, in such detail as the Commissioner deems necessary, which provides satisfactory assurance—

(1) that, except as provided in section 241g(b) of this title, payments under this subchapter will be used only for programs and projects which have been approved by the State educational agency pursuant to section 241e(a) of this title and which meet the applicable requirements of that section and of section 241c(a) (5) of this title, and that such agency

will in all other respects comply with the provisions of this subchapter, including the enforcement of any obligations imposed upon a local educational agency under section 241e(a) of this title; * * *

45 C.F.R., §116.19 provides in part:

"(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such arrangements as dual enrollment, educational radio and television, and mobile educational services and equipment. Such opportunities shall be made available to those educationally deprived children who reside in the public school attendance area designated as the project area or in a geographical area reasonably coterminous with the project area. If it is not practicable to apply a project to children enrolled in private schools because they are enrolled in a private school located in another school district, the applicant may make arrangements for such children with the local educational agency serving such other school district, including where appropriate the making of a joint project application.

(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them,

shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.

(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. The application for each project shall show the number of educationally deprived children enrolled in private schools who are expected to participate therein and the degree and manner of their expected participation.

(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and only when such services are not normally provided by the private

school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. Subject to the provisions of §116.20, mobile or portable equipment may be used on private school premises for such period of time within the life of the current project for which the equipment is intended to be used as is necessary for the successful participation in that project by educationally deprived children enrolled in private schools. Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities. * * *

45 C.F.R., §116.20 provides:

“(a) Control over the use of funds provided under Title I of the Act, and title to and administrative control over property acquired with such funds, shall be in a public agency, which will exercise such control. Such funds and property shall be used for the purposes provided in Title I of the Act, but such a use shall not inure to the benefit of any private school. The incidental use of such property for other purposes is permitted only for related educational purposes on public premises and only so long as such a use does not interfere with the carrying out of a Title I project.

(b) Equipment acquired with funds provided under Title I of the Act may, in certain cases, be placed

on private school premises for a limited period of time, but the title to and administrative control over such equipment must be retained and exercised by a public agency. In exercising that administrative control, the public agency shall not only keep records of, and account for the equipment but shall also assure itself that the equipment is being used solely for the purposes of the project, and remove the equipment from the private school premises when necessary to avoid its being used for other purposes or when it is no longer needed for the purposes of the project.

(c) The application by a local educational agency must contain a satisfactory assurance that the funds provided under Title I of the Act, and property derived therefrom, will at all times be under the control of, and be administered by, a public agency in accordance with the provisions of the Act and the regulations in this part."

QUESTIONS PRESENTED

Petitioners' Brief does not adequately and fairly state the questions at issue in this case. Respondents state the questions presented as follows:

1. Did the Court of Appeals err in finding that the Petitioners, Missouri State Board of Education and Commissioners of Education, failed to perform their duties under Title I ESEA by misadministering the program so as to deny educationally deprived children who attend private schools the equitable and comparable benefits under the Act?

2. Did the Court of Appeals err in finding that the Petitioners, State Board of Education and Commissioners

of Education, may not deny educationally deprived children who attend private schools benefits under Title I ESEA by relying upon their interpretations of state law or assertions of discretion?

3. Did the Court of Appeals properly order the Petitioners to administrate Title I programs so as to provide educationally deprived children who attend private schools equitable and comparable benefits under the Act including permitting the services of Title I personnel at private school premises during regular school hours where such services are available to educationally deprived children with similar needs who attend public schools?

4. Do the Petitioners have standing to attack the constitutionality of Title I ESEA? If they have such standing, have Petitioners timely raised and properly preserved the constitutional questions? Further should this court pass upon important constitutional issues on a speculative or hypothetical basis?

5. In the event that this Court determines that a constitutional question is properly before it, is the providing of Title I services to educationally deprived children who are enrolled in private schools by making public school personnel available on private school premises in violation of requirements of the Establishment Clause?

STATEMENT OF THE CASE

Respondents do not accept Petitioner's statement of the case.

THE PARTIES: Respondent children (Plaintiffs below) are educationally deprived children living in areas of concentrated poverty within the meaning of Title I

ESEA. (A. 11 and 12; R. Vol. p. 57.) Their parents are also parties. (A. 11 and 12.) They attend nonpublic schools in the inner city of Kansas City, Missouri. Some of the Respondent children attend St. Joseph's School, the others attend Our Lady of the Americas Upper and Lower schools. St. Joseph's has a predominantly Negro enrollment, and Our Lady of Americas' enrollment is 98% Mexican-American. (R. Vol. III, p. 92.) Each of these schools have a very high concentration of educationally deprived children. Out of a total enrollment of 178 children at Our Lady of Americas Upper, 171 are educationally deprived. Of 139 children enrolled in Our Lady of Americas Lower, 133 are educationally deprived. Of the 252 students enrolled at St. Joseph's, 106 are educationally deprived. (R. Vol. IV, Plaintiffs' Exhibit No. 7, p. 2, introduced in evidence R. Vol. III, p. 64.) In addition to being educationally handicapped, 119 children at St. Joseph's are culturally isolated. (R. Vol. V, Plaintiffs' Exhibit No. 8, unnumbered p. 144, offered in evidence R. Vol. III, p. 144.) The children at Our Lady of Americas also suffer from linguistic and cultural isolation. (R. Vol. III, p. 93.) They are representatives of a class of all educationally deprived non-public school children in the State of Missouri who are eligible beneficiaries of Title I ESEA. (R. Vol. I, p. 24.)

Petitioners (Defendants below) are the members of the Missouri State Board of Education and the present and past Missouri Commissioner of Education. (A. 11, 29, and 30.) Petitioners have the duty of approving all applications for Title I grants pursuant to the Act and criteria established by the United States Commissioner of Education, and also to enforce federal requirements on local public educational agencies. 20 U.S.C., Sec. 241f; 45 C.F.R., Sec. 116.34. (R. Vol. III, pp. 16, 22.)

THE PROCEEDINGS: Respondents commenced this civil action by a complaint filed April 6, 1970, in the United States District Court for the Western District of Missouri, charging that Petitioners (Defendants) had intentionally and consistently denied them rights guaranteed under the Constitution and laws of the United States. (A. 1, 9.)

On August 31, 1970, the District Court dismissed the complaint on the basis of federal abstention and further that the plaintiffs had failed to exhaust administrative remedies. (A. 3; R. Vol. I, p. 30.) On appeal, the United States Court of Appeals for the Eighth Circuit on April 28, 1971, reversed on both grounds and remanded the case for trial. *Barrera v. Wheeler*, 8th Cir., 441 F. 2d 795.

On January 18, 1972, the District Court entered a pre-trial order separating and limiting the issues of trial (R. Vol. I, p. 49) and on February 22, 1972, the trial was held on the issues as limited by the District Court. (A. 6.) On June 2, 1972, the District Court filed its Memorandum and Opinion finding *inter alia* that there had been "undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic school" but that "private school pupils could undoubtedly receive an equitable proportion of the funds through after-hour and summer school instruction programs." (Petition for Certiorari, p. A41 or R. Vol. I, pp. 59 and 60.) The District Court denied plaintiffs relief. The District Court's Opinion is unreported. (The full text of the District Court's Opinion is found in the R. Vol. I, pp. 58-63, and is also reprinted at page A39 et seq. of the Petition for Writ of Certiorari.)

On March 16, 1973, the United States Court of Appeals for the Eighth Circuit found that petitioners had flagrantly violated the provisions of Title I ESEA and reversed and

remanded the case to the District Court with directions to enter an injunction on behalf of respondents. *Barrera et al. v. Wheeler et al.*, 8th Cir., 475 F. 2d 1338. Petitioners have asked this Court to review that decision of the Court of Appeals.

THE TITLE I PROGRAM: Since this is one of the first cases involving the Elementary and Secondary Education Act of 1965, Title I, 20 U.S.C., Sec. 241a et seq. presented to this Court, a summary of the law may be helpful. For sake of brevity the Act shall at times herein be referred to as "Title I".

The Elementary and Secondary Education Act of 1965 (ESEA) was enacted as Public Law 89-10 with the following declaration of purposes:

"In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of low educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including pre-school programs) which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C., Section 241a.

The term "local educational agency" (LEA) normally means a public school district. 20 U.S.C., Sec. 244(6); 45 C.F.R., Sec. 116.1(r). In Missouri, the state educational agency (SEA) is the Petitioner, State Board of Education. 20 U.S.C., Sec. 244(7); 45 C.F.R., Sec. 116.1(aa).

"Educationally deprived children" are:

"... those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large." 45 C.F.R., Sec. 116.1(i).

Title I is not a general-aid-to-education type program but rather provides special services to a particular group, i.e. the educationally deprived children in low-income areas without regard to where or whether they attend school. 20 U.S.C., Secs. 241a and 241e(a) (1) & (2).

Not every public school district, not every public school attendance area, not every child, not every educationally deprived child, is eligible for Title I benefits. Based on the highest concentration of low-income families, certain school attendance areas are identified as a project area. Children residing outside of this project area may not participate in Title I programs. 45 C.F.R., Sec. 116.17(d). Children within the project area are tested for educational deprivation. From this it is determined what is the highest priority need; the greatest needs must be served first. For example, if most of the children are deficient in reading and only a few are deficient in mathematics, then remedial reading programs must be offered and children who are educationally deprived in mathematics do not participate. 45 C.F.R., Sec. 116.17(f). Finally, a project is tailored to meet the special educational needs of this group of children that have the greatest need. 45 C.F.R., Sec. 116.17(g). Even special programs cannot be provided to

educationally deprived children attending private schools if a private school normally provides the service. 45 C.F.R., Sec. 116.19(e).

Programs under the Act are fully financed by Federal funds appropriated by the United States Congress. No matching local funds are required from either state or local agencies. 20 U.S.C., Sec. 241g. Each state is eligible to receive Federal funds in an amount based upon a formula which principally considers the number of school age children from low-income families. 20 U.S.C., Sec. 241c. The maximum eligibility for Federal funds is further broken down to county and public school district units. 45 C.F.R., Sec. 116.2 et seq.

In order for a state to participate, its State Educational Agency (Petitioners here) must submit to the United States Commissioner of Education an application assuring: (1) that federal funds will be used only for programs approved pursuant to Federal law and criteria and the SEA will comply with all such provisions and enforce such obligations as are imposed on local educational agencies; (2) that fiscal control and fund accounting procedures necessary to assure proper distribution of Federal funds will be adopted; and that (3) required reports and records will be maintained and provided to the United States Commissioner of Education. 20 U.S.C., Sec. 241f.

Under Title I local educational agencies desiring to receive Federal funds must submit an application to the SEA for approval. The SEA is required to disapprove the application unless it meets the criteria established under the Act and by the regulations and directives of the United States Commissioner of Education. 20 U.S.C., Sec. 241e.

Among the determinations required to be made by the SEA prior to approval of an application is the following:

"(a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such criteria as the Commissioner may establish.)

* * *

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;" 20 U.S.C., Sec. 241e(a) (2).

The United States Commissioner of Education has established by regulation and directives further criteria which must be met by local educational agencies prior to receiving federal funds. Some of the criteria applicable to participation of children enrolled in nonpublic or private schools are as follows: (1) Educationally deprived children of such schools must be provided genuine opportunities to participate in special educational services consistent with their number and the nature and extent of their educational deprivation. 45 C.F.R., Sec. 116.19(a). (2) Services must be determined and be provided on a basis comparable to that used in providing for participation by educationally deprived children enrolled in public schools. 45 C.F.R., Sec. 116.19(b). There shall be an "equitable sharing" of Title I resources by both groups. USOE Program Guide No. 44, Sec. 4.5 (Reprinted USOE Handbook, p. 41). (3) Personnel employed under Title I who provide "mobile educational services" may be made

available on other than public school facilities (including nonpublic school premises) to provide special services which are not normally provided by the nonpublic school. 20 U.S.C., Sec. 241e(a)(2); 45 C.F.R., Sec. 116.19(e).

Federal funds made available to state and local educational agencies may be used only for expenditures necessary to carrying out approved projects. 20 U.S.C., Sec. 241e(a)(1); 45 C.F.R., Sec. 116.53. Control of all funds and properties must remain in public agencies. 20 U.S.C., Sec. 241e(a)(3). No Title I funds may be used for religious worship or instruction. 45 C.F.R., Sec. 116.53(e). Nor may federal funds or property "inure to the benefit of any private school." 45 C.F.R., Sec. 116.20(a).

STATEMENT OF FACTS

In 1965, the United States Congress passed the Elementary and Secondary Education Act, Title I, with the declared purpose being to break the "cycle of poverty" by assisting local educational agencies to provide for the "special educational needs of educationally deprived children" who live in areas with a concentration of poverty. 20 U.S.C., Sec. 241a.

The Act expressly provides that educationally deprived children will be helped, whether they attend a public school, a private school, or no school at all. 20 U.S.C., Sec. 241e(a)(2). The rights of educationally deprived children attending private schools to receive services under the Act are expressed by the United States Commissioner of Education in these words:

"The needs of private school children in the eligible areas may require different services and activities. These services and activities, however, must be com-

parable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the number of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." USOE Program Guide No. 44, Sec. 4.5 (reprinted USOE Handbook, pp. 41 and 42.) Also see: 45 C.F.R., Sec. 116.19.

Title I activities are carried out by local educational agencies, usually public school districts under applications which are approved by state educational agencies (the Petitioners here) pursuant to the federal law and criteria. 20 U.S.C., Sec. 241e. In order for Missouri to participate in this federal program, the Petitioners submitted assurances to the United States Commissioner of Education that they would use the federal funds only for projects which had been approved in compliance with the federal law and criteria, including the requirement that educationally deprived children attending nonpublic schools were to participate. 20 U.S.C., Sec. 241f.

Before the Act was even operational in Missouri, Petitioners, in October of 1965, adopted administrative prohibitions which limited the participation of educationally deprived children attending nonpublic schools to basically equipment loans and activities outside of regular school hours. (R. Vol. III, pp. 26 and 27.)

In defense of their actions, Petitioners assert that limiting the participation of educationally deprived children attending private schools is a matter within their discretion, and further, is based upon their interpretation of

state laws. Respondents contend and the Court of Appeals found that neither claims of discretion or interpretations of state law permit Petitioners to violate the requirement of the federal Act and criteria. The Court of Appeals said:

"The *only* control the state board has over such funds (Title I funds) is to channel them to the local agencies and to review the programs of the local educational agencies to make certain that the programs are consistent with the Act and the Commissioner's regulations." (Paren. added.) *Barrera et al. v. Wheeler et al.*, 8th Cir., 475 F. 2d 1338, at 1352.

The Attorney General of Missouri, in an official opinion, ruled that Missouri law did not impose limitations on the expenditure of federal funds and that Title I personnel may provide services to educationally deprived children attending private schools by offering those services on private school premises. *Barrera, supra*, at 1350, footnote 20. Petitioners refuse to follow the State Attorney General's Opinion. (Petitioners are not represented in this case by the Attorney General because of their refusal to follow his legal advice.)

The uncontroverted evidence in this case is that Petitioners' actions resulted in gross inequities to educationally deprived children attending private schools. Measured by any standard—proportionate expenditure of funds, services offered, the quality and scope of services, educational effectiveness—by all measurements educationally deprived children attending private schools were treated inequitably. Even the District Court found that there had been, "undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic schools." (Petition for Writ of Certiorari, p. A41.)

The Court of Appeals found that Petitioners had "flagrantly" violated the requirements of Title I. It is noteworthy that Petitioners still do not challenge the evidence nor the findings of the Court of Appeals on this issue.

A representative sample of actual Title I ESEA applications were introduced in evidence. The sample included two metropolitan, a suburban, and a rural school district. Although ESEA does not require an exact per capita expenditure for each and every child eligible for benefits, per capita expenditure is a significant means of measuring whether or not the program provides an equitable service. The following table compares per capita expenditures in these four representative school districts:

School District	Expenditure per public school	Expenditure per private school
	child	child
Berkley	\$210	\$85
Linn	\$244	\$30
Kansas City	\$250	\$25
St. Louis	\$242	\$10

Ed Downey, in charge of Title I for the Kansas City Public School District, also testified as to the gross disparity in per pupil expenditures in that District. (R. Vol. III, p. 69.)

An examination of these applications also shows that the activities available to educationally deprived children in public schools were extensive and varied, while opportunities for educationally deprived children attending private schools were mere tokens.

In no case and at no time were deprived children attending private schools allowed the benefit of Title I per-

sonnel services during regular school hours. (R. Vol. III, p. 18). It should be noted that there are only two basic ways of providing personnel services to deprived children attending private schools. They are dual enrollment and mobile educational services. 20 U.S.C., Sec. 241e(a)(2). USOE Handbook, p. 11. The actions of the Petitioners have prohibited educationally deprived children from participating in Title I services by either method. Since over 70% of Title I funds are spent on personnel (R. Vol. I, pp. 55 and 56) in effect, Petitioners have effectively eliminated deprived children in private schools from participation in over 70% of Title I opportunities.

Petitioners are the only state educational agency in the nation that have prohibited educationally deprived children enrolled in private schools from receiving the benefits of Title I services by either going to a public school through dual enrollment or having the Title I teacher come to the private school premises in the form of mobile educational services. (R. Vol. IV, Plaintiffs' Exhibit No. 2, offered in evidence R. Vol. III, p. 19. Also see: Survey conducted by the United States Office of Education, reprinted as Appendix to this Brief.)

Petitioners promulgated a policy which, on its face, would have required equitable expenditure of Title I funds for both public and private school children. The state policy, known as Policy No. 2, stated in part as follows:

"12. The average cost per pupil enrolled in a private school and participating in a Title I, ESEA, program and the average cost per pupil enrolled in a public school and participating in a Title I, ESEA, program will be used as a guide in making State Department of Education approval. If the variance is greater than 10 per cent (more or less) justification will be re-

quested before making approval." (R. Vol. IV, Plaintiffs' Exhibit No. 6, offered in evidence R. Vol. III, p. 28.)

However, the Petitioners Title I Director testified that in comparing per pupil expenditures they only considered the expenditures for equipment and totally excluded expenditures for personnel. For example, if a Title I application provided for expending \$200 per public school child for personnel services plus \$50 per child for equipment but provided no personnel and \$50 per child for equipment for nonpublic school children, then the State Title I Director would approve the application. (R. Vol. III, McCullough's Deposition, pp. 65, 66, 95, and 96.)

The Court of Appeals found that Petitioners' practices "flagrantly breaches the State Commissioner's own statement of policy." *Barrera, supra*, at 1345, footnote 8.

In October of 1972, the United States Commissioner of Education, Sidney Marland, notified the State Commissioner of Education that certain Title I programs in Missouri did not comply with the regulations regarding participation of private school children. (R. Vol. IV, Plaintiffs' Exhibit No. 2, offered in evidence R. Vol. III, p. 19; also, R. Vol. III, pp. 168 and 169.) Petitioners adamantly refused to change their policies and practices regarding the participation of deprived children attending private schools. Note the negative tenor of Petitioners' response to Commissioner Marland's letter. (R. Vol. VII, Defendants' Exhibit No. 6, offered in evidence R. Vol. III, p. 116.) Following Commissioner Marland's complaint, the Kansas City application was amended to provide additional equipment to deprived private school children, but no personnel services. (R. Vol. VI, Defendants' Exhibit No. 1, offered in evidence R. Vol. III, p. 48.)

The Court of Appeals found (and Respondents agree) that Title I does not require a certain expenditure per pupil. Title I services are to be based solely on the assessed need of the child. *Barrera, supra*, at 1347. The uncontroverted evidence is that even if an equal amount was expended per pupil limiting deprived private school children to equipment loans and after-hour services would not be comparable to the services of personnel during regular school hours. The Court of Appeals found:

"It is not a comparable program where the need for remedial services of the educationally deprived private school pupil is at least equal to that of the educationally deprived public school student and the only service provided to the private school child is the furnishing of equipment. It is not a comparable program to provide only after-hour and summer remedial instruction on neutral sites which are open to the needy private school child while offering the same services during regular school hours for deprived public school pupils," *Barrera, supra*, at 1348.

All of the educators who testified, including State Commissioner of Education Wheeler, testified as to the disadvantages of programs conducted outside of regular school hours.

"Thinking of my own sixteen year old daughter, I would a lot rather they would get it in the nine months' time than to have to go in the summer time, too. Everyone would feel the same way, I think. They are entitled to go during the day and get it. If they could get it during the week, it would be best." (R. Vol. II, Wheeler Deposition, pp. 87, 88.)

Ed Downey, Title I Director of the Kansas City Public School District testified:

"It is most difficult for special services to be provided without personnel as is evidenced by nonpublic school or, pardon me, public schools making use of such personnel to carry out an effective program." (R. Vol. III, p. 43.)

After extensive cross-examination, Mr. Downey reiterated, "In my judgment the provision of personnel would be advantageous." (R. Vol. III, p. 59.) When asked if an after-hour program could be made comparable by spending an equal amount of money as spent on public school programs during their regular hours, he stated, "It would be comparable in dollars amount spent, in my judgment, it would not be comparable as far as . . . educationally most appropriate." (R. Vol. III, p. 80.)

Since Petitioners, who had the power to approve or disapprove Title I applications in Missouri, uniformly disapproved the use of Title I personnel on private school premises, there is no evidence in the record as to how such a service would be actually implemented. The Court of Appeals, noting the variety of possible Title I programs, declined to give an advisory opinion on the constitutionality of hypothetical programs which were not before it. *Barrera, supra*, at pp. 1353, 1354.

Corrections of Petitioners' Statement: Petitioners have made a number of erroneous or inaccurate statements in their brief. We shall merely enumerate them at this point, and treat them more at length in relevant parts of our argument. The false statements reflect a basic lack of knowledge of Title I ESEA and a lack of understanding of the facts in this case. The inaccurate statements, we assume, are an overzealous effort to set forth their case.

Petitioners state that providing Title I ESEA services on private school premises is contrary to Missouri state law. The Attorney General of Missouri has ruled that state law permits Title I personnel to provide services on private school premises and that Missouri law does not restrict the expenditure of federal funds. *Barrera, supra*, at 1350, footnote 20. The Court of Appeals held that the state cannot pass a law or interpret its own laws to say that a Title I grant is to be considered state funds. *Barrera, supra*, at 1352. More accurately, Petitioners should state that they *assert* that state law limits the use of Title I funds. No legal authority concurs in their assertion.

Petitioners state that Title I services are "basically everyday regular instruction." (Petitioners' Brief, p. 26.) This statement is untrue. Title I services are limited to those designed to meet the special educational needs of educationally deprived children in school attendance areas having a high concentration of low-income families. 20 U.S.C., Sec. 241e(a)(1). In particular, Title I cannot provide any service already offered by a private school. 45 C.F.R., Sec. 116.19(e).

Next, Petitioners state that it is permissible to employ regular nonpublic school teachers under Title I. This statement is untrue. Title I does not permit payment of a salary of a private school teacher. 45 C.F.R., Sec. 116.19(e). Also see: Senate Report No. 146; 1965 U.S. Cong. Admin. News 1456.

Petitioners state that Title I does not include welfare benefits such as medical or dental care, breakfasts, and lunches, or even psychological services for maladjusted children. (Petitioners' Brief, p. 13.) They also indicate that the mentally retarded and emotionally disturbed children are not eligible. These statements are untrue.

45 C.F.R., Sec. 116.1(i) and (o). Also note: Senate Report No. 146; 1965 U.S. Cong. and Admin. News, 1455 and 1456, and the Testimony of Petitioners own Title I Coordinator. (R. Vol. III, p. 162.)

Petitioners also state that Title I teacher aides may assist regular nonpublic school teachers. (Petitioners' Brief, p. 36.) This statement is untrue. See: USOE Program Guide No. 24, Sec. 10. (Reprinted USOE Handbook, p. 36.)

SUMMARY OF ARGUMENTS

1. Title I ESEA clearly provides for meeting the special educational needs of all educationally deprived children living in low-income areas, including children in public schools, nonpublic schools, or out of school. Educationally deprived children are to be provided genuine opportunities to receive equitable benefits based on their need. Measured by any standard, Missouri educational officials have misadministered Title I so as to deny educationally deprived children attending private schools the comparable benefits intended by Congress. Measured by expenditures, program offerings, or educational effect, Title I services to deprived children attending private schools in Missouri demonstrate a state policy of tokenism and obstinate non-compliance with federal requirements.

Over 70% of Title I funds are spent for personnel. Every educator who testified in the case was of the opinion that comparable services cannot be provided in the absence of personnel. There are only two basic ways for providing the services of public Title I employees to deprived children attending private schools. They are dual enrollment and mobile educational services, i.e., sending public employees to serve deprived children at private school

premises. Dual enrollment is regarded as contrary to state law in Missouri. Missouri state laws do not prohibit or limit mobile educational services provided under Title I. (If Missouri law also prohibited mobile educational services, Missouri would be unable to participate in Title I.) Petitioners' denial of all personnel services to educationally deprived children attending private schools denies these children the benefits intended by Congress and violates the requirements of the Act.

Therefore, the Court of Appeals properly held that Respondent children were entitled to comparable Title I benefits and that under the unique situation existing in Missouri, public school employees, under Title I, must provide special services on private school premises consistent with the needs of the children if such services are provided to deprived children attending public schools.

2. The historical causes of Title I were the national problems manifest in the strong correlation between educational underachievement and poverty, as evidenced by draft rejection rates, unemployment, and the dropout problem. To meet this problem, Congress passed Title I to assist all educationally deprived children in poor areas throughout the nation.

Title I funds are only granted to public agencies. No private institution, its employees, or patrons can receive Title I funds. The services provided by public educational agencies are directed to the special needs of educationally deprived children. The services are not part of the regular curriculum of the private school, and do not supplant any service provided by a private school.

Unlike the unrestricted grants in *Nyquist*, *Sloan*, and *Levitt*, there is a clear separation under Title I between the secular services provided by public employees and the

religious functions of some private schools. Control of funds, title to property and the administration of the program are expressly limited to public agencies.


Unlike *Lemon*, *DiCenso*, and *Sanders*, where public funds were paid to sectarian institutions and their employees, no "excessive entanglement" is required under Title I to assure that secular limitations are complied with. Since no public funds go to private institutions, there is no occasion for examination of records or for auditing private institutions. Since all Title I personnel are the employees of public educational agencies and under their supervision and control, no occasion exists for the surveillance of private school employees. The Establishment Clause does not prohibit public institutions from supervising its own employees.

Like the public services provided in *Allen* and *Everson*, Title I provides services "in common to all students." No special beneficiary class is created along religious lines. Treating all children alike based on their educational needs is the antithesis of political divisiveness.

Title I establishes a program to help all deprived children, administered by public agencies, using public funds and employees, under public supervision and control. It provides secular services not otherwise available to deprived children attending private schools as part of a general program of helping all educationally deprived children. Thus, Title I does not violate the Establishment Clause.

3. The constitutionality of Title I was not raised by the Petitioners in the trial court. Neither the District Court nor the Court of Appeals passed upon the constitutional issue. Furthermore, since Petitioners' actions absolutely prohibited mobile educational services to educationally deprived children attending private schools, there

is no evidence before this Court as to how such programs would be actually implemented. Respondents assert that this Court should not exercise jurisdiction over constitutional issues which have not been properly preserved and presented to this Court; and further because any decision as to the constitutional implementation of Title I services would have to be based upon speculation and hypothesis.



ARGUMENT

I

In the unique situation existing in Missouri, if educationally deprived children who attend private schools in Missouri are to receive benefits under Title I ESEA comparable in quality, scope, and opportunity for participation to those provided for deprived public school children, then publicly employed teachers must, in most projects, render Title I services at private school premises during regular school hours.

The educationally deprived children enrolled in private schools are entitled to the benefits of Title I ESEA under the clear mandate of the Statute. They are not to be given instructional leftovers or academic handouts, but they must be considered the direct beneficiaries of the Statute. The State Board of Education, from the time of the earliest implementation of Title I to the filing of the Brief herein, persists in treating these children as unwelcome and unnecessary encumbrances in the planning and operation of Title I ESEA.

The Congress has provided in Title I ESEA as follows:

"A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)

* * *

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled

in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;"

The Court of Appeals found that it was the undisputed purpose of Title I to benefit educationally deprived children whether attending a public or a nonpublic school, and that the opportunities offered to deprived private school children by the Petitioners of mere equipment loans and after-hour programs were not comparable. Therefore, the Court concluded:

"Thus we find that when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises. In other words, we think it clear that the Act demands that if such special services are furnished public school children, then comparable programs, if needed, must be provided the disadvantaged private school child." *Barrera, supra*, at 1353.

The basic mandate of the Court of Appeals is that both private and public educationally deprived children equitably share Title I benefits. This could have been accomplished by requiring that all Title I services to both public and private school educationally deprived children be offered after regular school hours or during the summer. Since such programs are generally educationally poor, such a solution would have resulted more in mediocrity rather than in equity. For deprived children to receive the benefit of Title I personnel during regular school hours, other options must be used. Title I services could be pro-

vided at a service center outside of both regular public school and private school premises with all needy children going to the center. Note for example the instructional service center provided for teachers in the Kansas City application. (R. Vol. IV, Plaintiffs' Exhibit No. 7, offered in evidence R. Vol. III, p. 64.) Another option would be providing Title I services through self-contained mobile labs or teaching units which would travel to both public and private schools to serve educationally deprived children. USOE Handbook, p. 11. Dual enrollment is another option authorized by federal law. Classrooms could be leased from private schools as was done with approval in *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921.

The Petitioners delight in asserting that the Act does not require that public school teachers be sent to private school premises to render educational services. But such an artless pronouncement offers no solution to the issue, and cannot absolve the State Board from the results of its scheme to continue to emasculate the provisions of the Statute. The problem is that the State Board also announces that it will not approve of any plan of dual enrollment under Title I. The difficulty continues to exist.

The Court of Appeals discerned that the draconian pronouncements of the State Board demonstrated a deliberate plan to violate the directions of the Statute and to continue to deny the benefits of Title I ESEA to the educationally deprived children in private schools.

We are compelled to point out that the State Board of Education, its members and Commissioner in their lengthy briefs and pleadings in this cause, have yet to suggest any alternative to the use of public school, Title I personnel serving children at private school premises, for special Title I courses.

For eight years the State Board of Education had been content with the stubborn negativism toward educationally deprived children attending private schools. Petitioners have refused to follow the clear directions of the statutes. They have failed to comply with the assurances given to the United States pursuant to the Act. They have refused to follow the official opinions of the chief legal officer of the state of Missouri, and were intransigent in the face of investigations and recommendations of the United States Commissioner of Education. Note particularly Petitioners' response to Commissioner Marland, R. Vol. VII, Defendants' Exhibit No. 6, offered in evidence R. Vol. III, p. 116.) Even at a conference with the District Court held after the issuance of the Court of Appeals' opinion, the Petitioners adamantly refused to take any corrective action until the injunction was actually issued.

Faced with this history of obstinacy of Petitioners, the District Court, retaining continuing jurisdiction, issued an injunction designed to practically implement the opinion of the Court of Appeals.

The Courts of the United States have far reaching powers to effectuate their decrees and judgments. This Court recently stated:

"We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the circumstances. As we said in Green, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness."

"... The remedy for such segregation may be administratively awkward, inconvenient, and even bi-

zarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems. . . . When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

"In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals." (Emphasis added.) Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 at 25 and 28.

The injunction was designed to meet the practical problems in Missouri where comprehensive Title I programs during regular school hours are provided to educationally deprived children attending public schools while deprived children attending private schools were excluded from such programs by the obstinate actions of Petitioners and only provided equipment loans or partial after-hour services.

(1) Title I requires that educationally deprived children be served equitably and comparably, based on their needs.

Title I provides a comprehensive package of services to the educationally deprived child. It may include anything from special remedial instruction to services for the mentally retarded to a hot breakfast. But, the program must be "designed to meet the special educational needs of educationally deprived children in school attendance

areas having a high concentration of children from low-income families." 20 U.S.C., Sec. 241e(a)(1). Congress expressly provided that the educationally deprived child should receive the benefits whether attending a public or a nonpublic school. 20 U.S.C., Sec. 241e(a)(2).

In the criteria established pursuant to 20 U.S.C., Sec. 241e(a) the United States Commissioner of Education has provided that educationally deprived children attending nonpublic schools shall be provided "genuine opportunities to participate" in Title I programs "consistent with their number" and the "extent of their educational deprivation." The Commissioner has further required that the needs of educationally deprived children enrolled in nonpublic schools and the services provided them be determined "on a basis comparable to that used in providing for the participation" of educationally deprived children enrolled in public schools and that LEA applications shall show the "number," "degree and manner" of participation of such children. 45 C.F.R., Sec. 116.19(a), (b), and (c). The Commissioner has summed these requirements up in Sec. 4.5 of Program Guide No. 44 in these words:

"The needs of private school children in the eligible areas may require different services and activities. Those services and activities, however, *must be comparable in quality, scope, and opportunity for participation* to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce *an equitable sharing* of Title I resources by both groups of children." USOE Handbook, pp. 41 and 42. (Emphasis added.)

From the very inception of the legislation in question, there was an obvious official intention of providing comparable services for all educationally deprived children. President Johnson in his Message to Congress on Education on January 12, 1965, stated:

"Federal action is needed to assist the States and localities in bringing the full benefits of education to children of low income families. Assistance will be provided; for the benefit of all children within areas served, including those who participate in shared services or other special educational projects". 1965 Congressional Quarterly Almanac at 1374.

The clear intent is to help the educationally deprived child wherever he may be found. Whether the child attends a public school, a private school, or no school at all is merely a circumstance that must be considered in delivering the services to the child. To reach a dropout the program may have to go into pool halls because that is where these children are. To reach the delinquent, the program may go into correctional institutions because that is where these children are. To reach the handicapped, the program may have to go into the home or a health facility because that is where these children are. To reach an elementary or secondary school pupil the program usually will go into the schools, public and private, because that is where these children are. The goal is to reach *all* eligible children and serve their needs.

(2) Petitioners have inequitably administered Title I.

Petitioners have filed written assurances with the U.S. Commissioner that they will only approve Title I programs that meet the requirements of Section 241e(a) and will enforce these obligations upon LEA's. These assurances

are required by 20 U.S.C., Sec. 241f. However, the actions of Petitioners have to the contrary assured that the participation of educationally deprived children enrolled in non-public schools in Missouri will be peripheral at best.

The largest proportion of Title I funds are expended for personnel services. During the 1971 fiscal year in Missouri, 77.6% of Title I funds were spent for personnel services (including administrative services, health services, attendance services, transportation, and maintenance). Of this, 67.43% was for instructional personnel alone. (R. Vol. I, pp. 55 and 56.)

There are only two methods by which Title I personnel can serve educationally deprived children attending nonpublic schools during regular school hours. They are dual enrollment and mobile educational services. 20 U.S.C., Sec. 241e(a)(2). In dual enrollment, the pupil goes to the instructor for special services. A nonpublic school child would, on a part-time basis, attend a public school to receive Title I services. In mobile educational services, services come to the child. Either the Title I teacher comes onto nonpublic school premises or a self-contained mobile teaching unit with equipment and personnel goes on or adjacent to the nonpublic school premises. USOE Handbook, p. 11.

Prior to the implementation of Title I in October of 1965, the Petitioners, State Board of Education, adopted a regulation prohibiting both methods of providing services to educationally deprived children attending nonpublic schools.

State Regulation No. 1(d) provided:

"Title I, PL89-10 programs and projects operated by public school districts must be in conformity with the Missouri State laws. Section 167.031, RSMo., Supp. 1963 states:

Every parent, guardian or other person in this State having charge, control or custody of a child between the ages of 7 and 16 years shall cause the child to attend regularly some day school, public, private, parochial, parish, not less than the entire school term of the school which the child attends. . . . Therefore, *shared time or dual enrollment between public and non-public schools would not be in conformity with State law.* Programs operated in the public school for all children after regular school hours, on Saturday and during the summer, after the close of the regular school term, would be in conformity with the law." (R. Vol. III, p. 26.) (Emphasis added.)¹

State Regulation No. 4(d) provided as follows:

"Special educational services and arrangements, including broadened instructional offers made to children in private school, shall be provided at public facilities. *Public school personnel shall not be made available on private facilities.* This does not prevent the inclusion in a project of special educational arrangements to provide educational radio and television to students in private schools." (R. Vol. III, pp. 26 and 27.) (Emphasis added.)²

1. The State Board of Education has traditionally maintained that the Missouri compulsory attendance law required a school child to remain in his assigned school for six hours a day, State Regulations Title I State Department of Education (R. Vol. III, pp. 26 and 27), and the Court of Appeals noted that shared time, or dual enrollment, is presently unlawful in Missouri. (Petition for Writ of Certiorari—A18, A19.) At least, for practical purposes, the requirements of Title I ESEA cannot be satisfied by dual enrollment at this time. See: *Special District v. Wheeler*, Mo., 408 S.W. 2d 60.

2. There is no Missouri Constitutional provision, statute or court decision which provides that public personnel under Title I may not render services on private school premises. In fact, the Attorney General of Missouri has ruled to the contrary that such is permissible. See: subargument (3), *infra*.

Because of the limitations imposed by the Missouri State Board of Education, educationally deprived children in nonpublic schools in Missouri could not receive the benefit of Title I personnel services during regular school hours. They were limited to the receipt of such services after regular school hours, in the evenings, on weekends, and during the summer. (R. Vol. III, p. 27.)

The State Board of Education must find itself in a lonely, if not ridiculous, position in asserting that educationally deprived children in private schools in Missouri can receive the comparable and equitable educational benefits provided for them in the Act through means *other than* dual enrollment and mobile educational services. From the time of the hearings on the Bill onwards, it was clear that participation by private school children in special educational services would be by means of dual enrollment or by making public school personnel available on private school premises. 45 C.F.R., Sec. 116.19; USOE Program Guide No. 44 (P. Ex. 5, R. Vol. III, p. 25); Senate Report 146, 1965 U.S. Cong. and Admin. News, 1456, 1457; The Church State Controversy and Your Schools, Eugene J. Murphy, Vol. 10, School Management, page 117; Oct., 1966; Vol. 96, School and Society, page 24, January, 1968. Even those who opposed participation by private school children predicted that the enactment of Title I ESEA would be followed by a "massive infusion of Federal funds designed to extend" the pattern of dual enrollment. (Testimony of George R. LaNoaue and Lawrence Speiser, Hearings Before the Subcommittee on Education of the Committee on Education and Labor, 89th Cong. on H.R. 2361 and H.R. 2362, page 1659 et seq.)

The situation in this case does not exist in any other state in the union. Missouri is unique in its practices of excluding educationally deprived children enrolled in pri-

vate schools from receiving equitable benefits under Title I ESEA.

In a letter to State Commissioner of Education Malory dated October 22, 1971, the United States Commissioner of Education, S. P. Marland, Jr., stated as follows:

"As I understand the position of the State educational agency in this matter, you feel that Missouri State law precludes both the provision of Title I services on private school premises (a position with which your Attorney General does not agree) and dual enrollment or shared time programs in which private school children could participate in Title I projects on public school premises during regular school hours. Needless to say, this policy severely limits the type and amount of benefits which educationally deprived children in private schools may receive under Title I. To my knowledge, Missouri is the only State in the nation which has taken this extreme position on the provision of Title I services." (R. Vol. IV, Plaintiffs' Exhibit No. 2, offered in evidence R. Vol. III, p. 19.) (Emphasis added.)³

3. In its annual report to the President and Congress for 1972, the National Advisory Council on Education of Disadvantaged Children (established pursuant to 20 U.S.C., Sec. 2411) stated at page 29 of the Report:

"In order to receive title I funds, the State Attorney General must sign an assurance to the U.S. Commissioner of Education stating that all title I regulations will be observed, even if they conflict with State law. Yet with respect to three States—Missouri, Nebraska, and Oklahoma—the Office of Education is aware of noncompliance with the regulations, section 116.19, on service to children enrolled in nonpublic schools, and no enforcement action has been initiated.

"The Council recommends that any State which is not in compliance with section 116.19 be informed of the Commissioner's intention to enforce the law, by the end of fiscal year 1972." (Emphasis original.)

(Continued on following page)

Pursuant to a request of the Eighth Circuit Court of Appeals, a survey of Title I programs was done by the United States Office of Education. That survey revealed

Footnote continued—

Nor is the "extreme position" of the Missouri State Board of Education limited to Title I programs. In a speech entitled, "Urban Education: Partnership for Survival," delivered on January 10, 1973, in Washington, D.C., S.P. Marland, Jr., Assistant Secretary for Education, HEW, stated:

"By law and tradition and disposition Missouri is far and away the most stringent State in the country prohibiting public assistance for nonpublic schools. I am certain that abuses can be found in many other places, but the other States, almost without exception, have in general found ways to provide equitable services to nonpublic schools. Some have adopted shared-time programs. Missouri has ruled such efforts illegal. Some have said that a public school teacher can go into a nonpublic school to provide limited remedial services that are wholly paid for out of Federal funds. That has been allowed in State after State. Missouri has said no.

"The issue in Missouri has come to a head in connection with two programs in Jennings and Jefferson City that are funded under Title III of the Elementary and Secondary Education Act of 1965. We have discovered that while the programs were providing services to the public school children during the school day and in their regular classrooms, similar services were available to nonpublic children only after school and in non-classroom settings with offerings extended to Saturdays. There is simply no equity in such practices. Services to nonpublic children must be provided in ways comparable to those of the public schools - - - during the school day and in the regular classroom. If this failure is not corrected, the Office of Education intends to invoke for the first time the so-called 'by-pass' provision of Section 307 (F) of the Elementary and Secondary Education Act."

On October 30, 1972, the United States Commissioner of Education, after investigating the operation of Title III ESEA projects in Missouri invoked his power to by-pass State administration in regard to providing services to nonpublic school children after determining that in certain Title III ESEA projects in Missouri, "There are inadequate opportunities for effective participation on an equitable basis in these projects by children enrolled in private elementary and secondary schools in the area served. Accordingly I have determined that there is substantial inability or failure to provide for effective participation on an eligible basis for eligible children." (Partial text of a telegram from acting U.S. Commissioner of Education, Peter Muirhead, dated October 30, 1972, and addressed to Arthur L. Mallory, Commissioner of Education of Missouri.) In 1973, fourteen Missouri Title III programs were "by-passed."

that Missouri is the only State in the nation which both prohibits educationally deprived private school children from participating in dual enrollment programs and also prohibits Title I instructional services from being provided to educationally deprived private school children on private school premises during the regular school hours. That survey is reprinted as an Appendix to this brief.

The Court of Appeals found that Petitioners "flagrantly" violated the Act. Let us examine some of the evidence of the gross inequities caused by Petitioners' actions.

(a) Title I project expenditures in Missouri indicate gross inequity.

The approved Title I applications of the St. Louis, Kansas City, Berkley, and Linn Public School Districts were introduced as exhibits in the case. (St. Louis is Defendants' Exhibit No. 3, R. Vol. VI offered in evidence R. Vol. III, p. 11; Kansas City Application is Plaintiffs' Exhibit No. 7, R. Vol. IV offered in evidence p. 64, and also appears as part of Plaintiffs' Exhibit No. 8, R. Vol. V offered in evidence p. 144; Linn Application is Plaintiffs' Exhibit No. 9, R. Vol. V, offered in evidence p. 106, and also appears as part of Defendants' Exhibit No. 9a, R. Vol. VII, offered in evidence p. 108; the Berkley Application is Plaintiffs' Exhibit No. 10, Vol. V, offered in evidence p. 106, and also appears as part of Defendants' Exhibit No. 10a, R. Vol. VII offered in evidence p. 108.) These are a representative sample of all Title I applications in Missouri. They include two metropolitan districts, a suburban district and a rural district. The allocation of funds to St. Louis and Kansas City accounts for almost one-third of all Title I funds expended in Missouri. (R. Vol. III, p. 164.)

These exhibits are very lengthy, and for the convenience of the Court, Respondents have made the following comparative analysis of the approximate expenditure per pupil in each of these four Title I programs.

<u>School District</u>	<u>Expenditure per public school child</u>	<u>Expenditure per private school child</u>
Berkley	\$210	\$85
Linn	\$244	\$30
Kansas City	\$250	\$25
St. Louis	\$242	\$10

NOTE: Respondents do not contend that Title I ESEA requires an equal expenditure of funds per public and per nonpublic school child. USOE Handbook, p. 5. Respondents do contend that where the assessed needs of the children are the same, Title I ESEA requires that both private and public school children receive services which are comparable and equitable. 45 C.F.R., Sec. 116.19 (a) and (b); USOE Handbook, p. 6; USOE Program Guide No. 44, Sec. 4.5. (Reprinted in USOE Handbook at p. 41.) Respondents introduced these expenditure figures because they are an indicia of lack of comparability of services. USOE Handbook, p. 38. Further, this evidence demonstrated that Petitioners did not comply with their own "Policy No. 2" regarding per pupil expenditures which will be discussed later.

Ed Downey, in charge of Title I for the Kansas City Public School District, testified that to the best of his recollection, during fiscal year 1972, the average per pupil expenditure for public school children participating in the Title I program was \$275, whereas the average per pupil expenditure for private school children was \$40 or \$50.

(R. Vol. III, p. 69.) In October, 1972, the United States Commissioner of Education found that the Title I project for Kansas City and two other school districts did not comply with federal regulations regarding participation of private school children. (R. Vol. III, pp. 168 and 169.) In an effort to equalize per pupil expenditures, in February, 1972, the Kansas City Public School District amended its project to provide several times more equipment and supplies for lending to nonpublic school children. Mr. Downey estimated that an additional expenditure of \$61,356 was necessary to equalize the expenditure for private school children as compared to public school children. Prior to this recommended change, only \$19,624 worth of equipment and supplies and \$7,770 worth of administrative services were available to eligible children enrolled in private schools in Kansas City. (R. Vol. VI, Defendants' Exhibit No. 1, Memorandum from Ed Downey to Robert F. Simon date January 28, 1972, offered in evidence R. Vol. III, p. 48; also See: R. Vol. III, p. 77.)

Petitioners, Missouri State Board of Education, adopted a state guideline known as Policy No. 2. Paragraph No. 12 of that Policy stated as follows:

"The average cost per pupil enrolled in a private school and participating in a Title I, ESEA, program and the average cost per pupil enrolled in a public school and participating in a Title I, ESEA, program will be used as a guide in making the State Department of Education approval. If the variance is greater than 10 per cent (more or less) justification will be requested before making approval." (R. Vol. IV, Plaintiffs' Exhibit No. 6, offered in evidence R. Vol. III, p. 28.)

D. D. McCullough, Title I Director for the State Department of Education, testified how *in practice* this policy was implemented. He testified as follows:

"Q: Would you exclude the amount of money expended for personnel from your calculation of per capita expenditure because of this constitutional thing you mentioned?

"A: At the non-public school? I don't follow you.

"Q: Let's try some illustrations. Let's assume there is a remedial reading program; that the public school program includes teachers and teachers' aids, and equipment, materials, and supplies. And the non-public school program is operated by volunteers and not through Title I funds.

"As far as Title I funds, they would have equipment, materials, and supplies.

"Let's say the amount of the equipment, materials, and supplies expended for public and non-public were equal per capita, say \$10 a child.

"Now then, the amount of personnel in the budget—

"A: —would be excluded.

"Q: —would be \$200 per child for public school children; would you exclude this \$200?

"A: In figuring the variance, yes.

"Q: The equipment is equal, therefore it complies with Policy No. 2?

"A: Right." (R. Vol. II, McCullough Deposition, pp. 65 and 66.)

McCullough went on to testify at another point as follows:

"Q: Now, let's go back to the hypothetical case we had awhile ago where \$250 was expended per pupil in public schools in \$50 was expended per pupils in non-public schools, but the equipment was equal and the \$50 worth of equipment was in public schools and \$50 within non-public, and the \$200 per capita in the public schools was for personnel.

"Now, you stated earlier that you would just compare the equipment, since personnel is excluded?

"A: That is correct.

"Q: Would you regard that situation as being in compliance with the federal regulation and guide (45 C.F.R., Sec. 116.19(b) and Program Guide No. 44, Sec. 4.5) we have just discussed regarding comparable participation?

"A: Yes." (R. Vol. II, McCullough Deposition, pp. 95 and 96.)

The Court of Appeals found that "the Title I programming within Missouri school districts flagrantly breaches the State Commissioner's own statement of policy (Policy No. 2)." *Barrera, supra*, footnote 8 at 1345 (parens. added).

Prior to trial, Respondents applied for a preliminary injunction which would have in effect ordered Petitioners to comply with their own Policy No. 2. In connection with that proceeding, Petitioners admitted that if the Preliminary Injunction were granted, it would have been necessary for them to "reallot between \$5 million and \$6 the next three months." (R. Vol. III, p. 29.)

Even the District Court found that there was "an undoubtedly inequitable expenditure of Title I funds be-

tween educationally deprived children in public and nonpublic schools in some local school districts in the state." (Petition for Writ of Certiorari, p. A41.)

Apart from comparing expenditure of funds, an examination of the approved Title I applications in evidence shows that although the needs of educationally deprived children attending private schools were similar to those in public schools, deprived children in public schools were provided comprehensive services whereas private school deprived children were given mere token benefits.

(b) The scope and quality of programs offered to educationally deprived children attending nonpublic schools in Missouri were also very inequitable.

As might be expected from the gross inequities in expenditures, there were in fact large differences in the actual benefits offered to educationally deprived children depending on whether they were attending a public or a nonpublic school.

An examination of the Title I application of the Kansas City Public School District *as approved by the Petitioners* shows that the following services were available to deprived public school children: remedial reading at the elementary and secondary levels, an intensified parent program, an instructional services center, a fine arts theater, a remedial language development program, two Follow-Through programs, an extended day kindergarten, and a remedial mathematics and science program. By comparison, deprived children attending nonpublic schools could only participate in the fine arts theater, and their teachers could attend the instructional service center. Over 68 full-time, and over 43 part-time certified staff members provided services to public school children; whereas nonpublic school children received no benefits from Title

I personnel. (Vol. V, Plaintiffs' Exhibit No. 8, offered in evidence R. Vol. III, p. 144) This project was later revised after pressure from USOE.

According to an "Abstract of Approved Projects" prepared by Petitioners' Title I Supervisor, Lloyd Boyd, analyzing the Title I application of St. Louis City, the following services were available to public school children: "Rooms of 15" (a full-time compensatory education program), remedial reading, a program for socially maladjusted high school students, an instructional supplementary services program, a study-learning resources center, audio-visual services, an instructional materials center, a curriculum center, a Follow-Through program, a Work Study program, and a reading assistance program. The project called for 352 certified personnel, and 357 non-certified personnel at an estimated expenditure of \$4,270,485. On the date that this project was approved, *no activities* at all were proposed for nonpublic school for educationally deprived children attending nonpublic schools. (R. Vol. VI, Defendants' Exhibit No. 3, unnumbered pages 2 and 3, offered in evidence R. Vol. III, p. 11.) Subsequently, about \$20,000 of Title I services were provided for nonpublic school children.

Burrell Laney, a Regional Supervisor for the State Department of Education, testified regarding the Title I program at Joplin, Missouri. According to his testimony, the Joplin Title I program made available to private school children a tutorial service in reading, language arts, math, social science, and design offered from 3:30 to 5:00 after school hours. (R. Vol. III, pp. 124 and 127.) On the other hand, Title I services available to public school children during regular school hours and on the school premises where they normally attended were the following: remedial reading, remedial math, remedial lan-

guage arts, an audio-visual center, library services, health services, guidance services, teacher aides, a tutorial program, a summer arts and crafts program, and a learning disabilities center. (R. Vol. III, pp. 132 to 134.)

In the Linn Public School District, deprived public school children had the opportunity to participate in a remedial science program, a remedial math program, a remedial reading program, two small class instruction programs, and a library program all of which were staffed by certified personnel. On the other hand, nonpublic school children were only allowed to participate in a Saturday remedial program, although 36% of the educationally deprived children attended nonpublic schools, 63 out of a 173 total. Only 7% of the program budget provided services to nonpublic school children. Needy public school children had the services of 6 full-time certified staff members. By comparison, nonpublic school children received services on Saturday only from two part-time certified staff members. (R. Vol. V, Plaintiffs' Exhibit No. 9 offered in evidence R. Vol. III, p. 106.) After a complaint, the Linn project was amended to add additional Saturday services. (R. Vol. VII, Defendants' Exhibit 9a, offered in evidence R. Vol. III, p. 108.)

(c) Programs without personnel or after-hour programs are ineffective and necessarily uncomparable.

As we have seen, Petitioners in their administration of Title I limited the participation of educationally deprived children enrolled in nonpublic schools basically to equipment loans and after-hour programs. No one seriously believes that such programs provide "genuine opportunities" for participation. Even if equal or even greater funds were spent on such programs, the evidence in this case conclusively supports the Court of Appeals

finding that these children still would not receive comparable benefits from Title I. The most effective type of services is that provided by a teacher or other specialist during regular school hours. There is nothing comparable to the services of personnel except the services of personnel.

The Court of Appeals found, "It is not a comparable program where the need for remedial services of the educationally deprived private school pupil is at least equal to that of the educationally deprived public school student, and the only service provided to the private school child is the furnishing of equipment." *Barrera, supra*, at 1348.

Equipment alone does not constitute a program. Equipment and materials are merely supportive of the Title I activity. USOE Handbook, p. 11. Federal and state guidelines restrict equipment, materials, and supplies to not more than 15% of the Title I budget. (R. Vol. III, p. 167.)

Mr. Downey testified:

"It is most difficult for special services to be provided without personnel as evidenced by . . . the public school making use of such personnel to carry out an effective program." (R. Vol. III, p. 41.)

He stated that it was possible to spend the same amount of money per child in private school as per child in the public school without sending personnel to the private school child. However, he went on to clarify by stating, "It would be comparable in dollar amount spent, in my judgment, but would not be comparable so far as . . . educationally most appropriate." (R. Vol. III, pp. 75 and 80.)

The ineffectiveness and disadvantages of after-hour programs was attested to by witnesses for both Petitioners and Respondents.

Sister Agnes Marie Hagan, Principal of the private school at which some of the Respondents attend, testified that after school programs did not succeed at all. They had been tried under the Model Cities program, but she said, "It was just almost an impossible situation to get the children to go to a class after school hours." (R. Vol. III, p. 100.)

Hubert Wheeler, retired State Commissioner of Education, testified that it would be at a disadvantage to provide Title I services after school hours.

"Q: Would it be a disadvantage to provide Title I on Saturdays?

"A: If you can get it on other days, it certainly would.

"Q: How about during the summer, if you could get it during the school year?

"A: Thinking of my 16 year old daughter, I would a lot rather they would get it in the nine months' time than to have to go in the summer time, too. Everyone would feel the same way I think." (R. Vol. II, Deposition of Hubert Wheeler, pp. 87 and 88.)

D. D. McCullough, Title I director for the Missouri State Board of Education, testified as to a number of disadvantages of programs operated outside of regular school hours. He stated that transportation was a problem. After-hour programs were more costly, and educational time was lost. Furthermore, most personnel do not like to work overtime. (R. Vol. II, Deposition of D. D. McCullough, pp. 44 and 45.)

Burrell Laney, a Regional Supervisor of Title I projects for the Missouri State Board of Education, testified that the vast majority of public school programs under Title

I were operated during regular school hours. In the region under his supervision, 68 out of 70 school districts provided public school programs during regular school hours. (R. Vol. III, p. 134.)

Ed Downey, Title I Specialist for the Kansas City Public School District, testified that especially in the inner city children with special needs have an aversion to summertime classes, and participation is low. (R. Vol. III, p. 68.)

The criteria established by the United States Commissioner of Education states that services provided at inconvenient hours and locations "do not meet the 'comparability' factor mentioned in the regulations." Program Guide No. 24 (Reprinted in USOE Handbook, p. 38) 45 C.F.R., Sec. 116.17(a).

Where a statute has received a contemporaneous interpretation and the statute as interpreted is re-enacted, such interpretation is accorded considerable weight and is regarded as the presumptively correct interpretation of the law. *United States v. Anderson*, 269 U.S. 422. In this connection, the House Committee on Education and Labor submitted a Supplemental Report to accompany HR 1316 in 1966. This Report dealt with the amendments to the Elementary and Secondary Education Act of 1965. The House Committee commented on and concurred with the first Report of the National Advisory Council on Education of Disadvantaged Children (Report to the President on January 31, 1966). In this Report, the Council stated:

"We wish to emphasize this by special reference to our intentions expressed last year. These projects under public auspices contemplate broadened instructional offerings and special educational services and arrangements that meet the needs of the educationally deprived children attending nonpublic schools. These

projects may not supplant the regular private school curriculum. Solutions to overcome educational deprivation require a high degree of imagination, flexibility, and creative new avenues of cooperation within the community. Within the limitations of the act we are eager to preserve and encourage local determinations of remedies for local problems." (Supplemental Report, Report No. 1814, Part 2, 89th Congress, 2d Session, p. 3.)

The Committee then stated:

"While the Committee and the Council have emphasized the importance of adherence to Constitutional safeguards, the Committee does not expect that such considerations will be simply a device by which only a token communication with private school administrators is extended, or worse yet, by which the projects in which private school children can participate are *inconvenient (for example, scheduling programs other than during regular hours of school attendance) awkwardly arranged, or poorly conceived*. To the contrary, it is expected that earnest efforts will be made to ascertain from private school administrators an accurate appraisal of underachievement and other special needs of educationally disadvantaged children who do not attend the public schools. Projects for such children should be so designed as to effectively eliminate those factors which preclude the educationally deprived child from gaining full benefit from the regular academic program offerings in the private institution in which he or she may be enrolled." (Emphasis added.) Supplemental Report, Report No. 1814, Part 2, 89th Congress, 2d Session, p. 3.

In order to obviate any different interpretation, the Committee Report stated that:

"Nothing contained in House Report 1814 (The Report on the '66 Amendments) contradicts any commentary in House Report 143, 89th Congress, First Session, which Report is the controlling view of the Committee with respect to Public Law 8910." (Supplemental Report, *supra*, note 2 p. 2.)

This Supplemental Report is particularly valuable since it was made within a year of the enactment of ESEA and during the process of amendments which explicitly affirmed the '65 legislation. Moreover, it concurs with the first Report of the Council and emphasizes the proposition that children in nonpublic schools should not be deprived of the benefits of the law due to arguments based on state constitutional considerations which are not controlling.

The testimony that after-hour programs are not comparable to regular hour programs is uncontradicted in the record. The Court of Appeals found "It is not a comparable program to provide only after-hour and summer remedial instruction on neutral sites which are open to the private school children while offering the same services during regular school hours for deprived public school pupils, especially when the partial expense for transportation must be borne by the private school child who comes from the low-income family." *Barrera, supra*, at 1348.

(3) Petitioners' claims of state law limitations and discretion as defenses for these inequities are invalid.

In defense of their manifestly inequitable practices, petitioners claim that this is within their administrative discretion and that purported state law limitations excuse their acts.

Petitioners contend that they have "wide discretion" in administering Title I programs. Respondents are well aware of the provisions of 20 U.S.C., Sec. 1232a, which prohibit federal control of local curriculum, instruction, etc. Respondents agree the choice of teaching methods, textbooks, and materials and other pedagogic matters are and should be with the local public educational authorities. Even without Section 1232a, the whole of Title I ESEA clearly indicates that the design of educational programs is the responsibility of the local public school agency. (Note this discretion is at the local and not state level. See: Senate Report No. 146, 1965 U.S. Cong. and Admin. News 1446, 1457.) However, what is at issue in this case is not the choice of pedagogic methods, but the practical exclusion of educationally deprived children enrolled in private schools from 70% of Title I services available in Missouri.

As the Court of Appeals observed, "no particular program, curriculum or service, is mandatory under the Act." *Barrera, supra*, at 1354. However, "the law specifies that instructional services and related activities *must* be provided for eligible private school children before an application for a grant may be approved by the state educational agency." USOE Handbook, page 1. (Emphasis added.) The Act clearly requires the providing of Title I services to meet the special educational needs of educationally deprived children enrolled in private schools. 20 U.S.C., Sec. 241e(a) (1) and (2). This requirement is further spelled out in the regulations (45 C.F.R., Sec. 116.19) and the other criteria established pursuant to law by the United States Commissioner of Education. Further see: subpoint (1) *supra*.

Petitioners do not have "discretion" to violate the requirements of the Act.

Petitioners also assert that they are excused from complying with the requirements of Title I ESEA regarding the participation of private school children because of alleged limitations of state law. (Petitioners' Brief, pp. 20 et seq.) The Court of Appeals found "that the grants under Title I must accommodate state law." *Barrera, supra*, at 1351. Respondents do not contest this finding. The Act does not require state officials to violate state laws. On the other hand, the existence of state laws does not excuse state officials from complying with the requirements of the Act.

In the words of the United States Office of Education, "While state constitutions, laws, and their interpretation limit the options available to provide services to private school students, this fact, in itself, does not relieve the state educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the federal law and regulations." USOE Handbook, p. 20. Also see: Congressional Committee Supplemental Report No. 1814 quoted *supra*.

If state law were to prevent Missouri from providing equitable benefits to educationally deprived children attending private schools, then Petitioners are unable to give the assurances required by 20 U.S.C., Sec. 241f and Missouri must forego participation in the program.

The Court of Appeals expressed it in this way:

"The state could conceivably pass a law that would prohibit the use of *any* Title I funds in a private school. Assuming such a law could overcome equal protection arguments, the net effect would be that the state could not comply with the Title I requirement that comparable services be administered to educa-

tionally disadvantaged nonpublic school children. Under those circumstances, the state would not be entitled to a Title I grant and would have to make the 'political' decision of whether to repeal the law or deprive all of its educationally disadvantaged children of the economic benefits of the Act." *Barrera, supra*, at 1352.

State law does not limit services of Title I personnel: The discussion of whether or not state law limitations excuse state educational agencies from complying with the requirements of Title I ESEA is academic for the reason that although Petitioners have asserted that Missouri law prohibits Title I personnel from providing services on nonpublic school premises, no judicial or legal authority has ever concurred in their assertion.

The Missouri Attorney General, in an official opinion issued January, 1970, held that Title I personnel may be made available on private school premises to provide special services to eligible children and that Missouri law would not prevent public school personnel paid with federal funds from providing these services on the premises of a private school. *Barrera, supra*, at 1350, footnote 20.

The Court of Appeals stated:

"The *only* control a state board has over such (Title I) funds is to channel them to local agencies and to review the programs of the local educational agencies to make certain that programs are consistent with the Act and the Commissioner's regulations. A state cannot pass a law or interpret its own laws to say that a Title I grant is to be considered state funds or public funds for the maintenance of free schools." (Emphasis original.) *Barrera, supra*, at 1352.

It is also to be noted that the Missouri Constitution expressly provides:

"Money or property may also be received from the United States to be redistributed together with public money of this State *for any public purpose designated by the United States.*" Missouri Constitution, Article III, Section 38 (a). (Emphasis added.)

Petitioners in their zeal would "prohibit (the United States) from extending its general (federal) law benefits to all citizens without regard to their religious belief." Paraphrase of *Everson v. Board of Education*, 330 U.S. 1, 16.

Thus, Petitioners cannot excuse their practices by protestations of discretion or state law limits.

(4) Title I authorizes public school personnel to provide special educational services to educationally deprived children on private school premises.

The Act enumerates examples of special educational services and arrangements which may be provided to educationally deprived children enrolled in private schools. Included in these examples is "mobile educational services". 20 U.S.C., Sec. 241e(a) (2).

"Mobile educational services" are services that come to the child such as "a public school teacher comes onto the private school premises to teach a remedial class; a mobile teaching lab with equipment and a teacher makes regular scheduled stops at a private school; a speech therapist works with private school children at the private school." USOE Handbook, p. 11.

The floor debate in the House of Representatives clearly indicates an intent to permit public employees un-

der Title I to provide special educational services to deprived private school children by going into a private school building. In the debate, the sponsors of the bill distinguished between special services which were permitted and general education which was prohibited, and also between a private school building as a place for rendering services and the private school as a juridical person. Because other Congressmen did not have these distinctions clearly in mind, there was at first some confusion which, however, was ultimately clarified.

One of the amici in their brief, by taking certain quotes out of context, has tried to convey the impression that the Congress did not intend to make Title I personnel available on private school premises. For example, at one point Congressman Perkins stated, "We do not intend to put teachers in private schools, no." 111 Cong. Rec. 5571 (1965). However, when read in context, what Congressman Perkins was saying was that public school teachers could not provide general services on private school premises, but only special services directed to the assessed need of the private school child. For example, on the next page, Congressman Perkins stated, "There are special services as to which I would say 'yes', but generally 'no'." 111 Cong. Rec. 5572 (1965).

The supporters of the bill stated that Title I services were to be provided at private school buildings, but were not to be under the jurisdiction or part of the regular instructional program of the nonpublic school. Note the statements of Congressman Carey (a member of the Education Subcommittee) making this distinction. 111 Cong. Rec. 5571 (center column) and 5579 (third column) (1965).

The whole discussion was summed up by Congressman Thompson in these words:

"Services and arrangements provided for nonpublic school students must be special as distinguished from general educational assistance.

"The decision about the best arrangement for providing special educational assistance under Title I is left to the public education agency of the school district, under the constitution and the laws of the State.

"Thus, public school boards could make available the services of such special personnel as guidance counselors, speech therapists, remedial reading specialists, school social workers who would reach the non-public-school children in the public schools or through public services in the nonpublic school buildings, or through mobile services, or through ETV, or through community centers, et cetera. But these special services would not be part of the regular instructional program of the nonpublic schools. Thus, nonpublic schools could not get general classroom teachers in history, English, mathematics, and social studies." 111 Cong. Rec. 5895 (1965).

Both Representative Powell of New York, Chairman of the House Committee, and Representative Perkins of Kentucky, the sponsor of the Bill, and Chairman of the Subcommittee which reported the legislation, fully agreed with Mr. Thompson's clarification of the issue. Committee members such as Congressman Carey of New York and Congressman Cahill of New Jersey, who actively participated in the debate, likewise agreed that this was an accurate summation of the intent of the House. 111 Cong. Rec. 5583, 5894-95 (1965).

Though other statements may appear in the Record in the House debate, the only definitive statement of intent is the statement by Mr. Thompson which, as indicated,

received the full agreement of the sponsor of the Bill and the Chairman of the Full Committee.

More persuasive as to the meaning of a legislative enactment, are the committee reports. *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701 (1949). The Congressional committee reports clearly express the intention that Title I personnel may be made available on private school premises to provide special services. In the Senate Report we find this statement:

"Thus, the Act does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools.

"It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide individualized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school.

"In this regard the Committee has reviewed carefully the language in the bill to assure that the local educational agency will maintain administrative supervision and control of the programs provided under the Title and that the title to any property constructed or purchased shall be in a public agency and that a public agency will distribute the funds and property for the purposes of the Title." (Emphasis added.) Senate Report No. 146, 89th Congress, First Session, 1965 U.S. Congressional and Administrative News at 1457.

This legislative history has been carried forth by the Commissioner in his regulations which provide that Title

I personnel may be made available on private school premises when necessary to provide special educational services for educationally deprived children enrolled in private schools so long as the service is not already provided by the private school. 45 C.F.R., Sec. 116.19(e). Also note that the regulations provide that Title I projects should be carried out at locations where the needs of the educationally deprived children may best be served. 45 C.F.R., Sec. 116.17(a). Also regarding Title I personnel on private school premises see: USOE Program Guide No. 24, Sec. 10. (Reprinted in USOE Handbook, p. 36.)

Petitioners argue that Title I must be construed to prevent publicly employed teachers furnishing educational benefits on private school premises. Petitioners cannot nullify and evade the command of the Congress, and justify its actions by a totally unwarranted construction of the Statute. As was clearly pointed out in *United States v. International Union United Automobile, Aircraft & Agricultural Implement Workers of America*, 352 U.S. 567, 589 (1957), and as may be appropriately said of this case:

"... Here only one interpretation may be fairly derived from the relevant materials. The rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands."

Also see: *Yu Cong Eng v. Trinidad*, 271 U.S. 500, at 518.

Based on the Act and an examination of the legislative history the Court of Appeals found that Title I clearly does permit public personnel to serve educationally deprived children on private school premises. *Barrera, supra*, at 1349.

(5) Conclusion.

Since there can be no doubt that Title I requires either "dual enrollment" or "mobile educational services" for genuine participation by educationally deprived children attending private schools, it follows that since programs of dual enrollment are not available in Missouri, then programs which provide for sending public school, Title I, personnel onto private school premises are essential to the lawful implementation and operation of Title I for educationally deprived children in private schools, based on their needs. This is the essence of the Court of Appeals' decision and certainly the Court of Appeals could reach no different conclusion here.

Respondents submit that the Court of Appeals correctly held that Title I ESEA requires that educationally deprived children in both public and private schools receive equitable and comparable services based on their determined needs; that it is permissible under Title I ESEA for public personnel to provide special services to educationally deprived children on nonpublic school premises; that it is not comparable or equitable where the needs of the children are equal to provide remedial instructional services to deprived public school children during regular school hours and only to provide equipment or after-hour and summer instruction to deprived children attending private schools; and that under the facts presented in Missouri, if special services during regular school hours are furnished to public school children on their regular school premises, then, based on their need, such services must be provided to deprived private school children at the private school premises.

II

It does not violate the Establishment Clause if public school employees in serving the needs of all educationally deprived children provide Title I services at the premises of private schools.

Neither the District Court nor the Court of Appeals passed upon the constitutional issue which Petitioners have raised in this Court. The question of whether or not the issue is properly before this Court is presented in a separate argument.

In *Lemon-DiCenso-Sanders*⁴ and *Levitt-Nyquist-Sloan*,⁵ this Court invalidated state statutes for failure to meet one or more of the three tests of secular purpose, primary effect, and excessive entanglement. What common defects led to the invalidation of these state laws?

(1) All were enacted during a period of financial crisis in nonpublic education and with the expressed legislative intent to solve this crisis. As expressed by Justice Powell, "... at bottom its (the statutes) intended consequence is to preserve and support religion-orientated institutions." *Sloan, supra*, at 2986.

(2) Each involved a direct cash payment to either a nonpublic institution or an unrestricted grant or tax benefit to a nonpublic school parent.

(3) In *Levitt, Nyquist*, and *Sloan*, "the aid that will be devoted to secular functions is not identifiable and

4. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Earley v. DiCenso*, 403 U.S. 602 (1971); *Sanders v. Johnson*, 403 U.S. 955 (1971).

5. *Levitt v. Committee for Public Education and Religious Liberty*, ____ U.S. ____, 93 S.Ct. 2814 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, ____ U.S. ____, 93 S.Ct. 2955 (1973); *Sloan v. Lemon*, ____ U.S. ____, 93 S.Ct. 2982 (1973).

severable from aid to sectarian activities." *Levitt, supra*, at 2819. And in *Lemon*, *DiCenso*, and *Sanders*, although the assistance was limited to secular functions, enforcement of that limitation required surveillance of private school personnel and maintenance and auditing of nonpublic school records.

(4) In each of these cases, the beneficiary class was limited to nonpublic education. In the words of Justice Powell, "The state had singled out a single class of citizens for a special economic benefit." *Sloan, supra*, at 2986. This Court has concluded that the state's establishment of a special beneficiary class creates competition between public and nonpublic education for public funds. And, in the words of Justice Powell, ". . . in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor." *Nyquist*, 93 S.Ct. 2955, 2976.

On the other hand, in *Everson* and *Allen*, *Tilton* and *McNair*,⁶ this Court upheld state and federal programs assisting both public and nonpublic education. Why did these statutes pass constitutional muster? We shall limit ourselves primarily to *Everson* and *Allen*, since the statute presently before the Court deals with elementary and secondary education and not higher education.

(1) Neither the statute in *Everson* nor in *Allen* was enacted against the history of financial crisis in nonpublic education. The declared legislative concern was for the public welfare and safety.

(2) In neither *Everson* nor *Allen* were public funds paid directly to sectarian institutions, nor through parents

6. *Everson v. Board of Education*, 330 U.S. 1 (1946); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, ___ U.S. ___, 93 S.Ct. 2868 (1973).

to the institutions. The reimbursement to the parent in *Everson* was not for payments to a sectarian institution, but for the cost of public transportation. In both cases, the primary intended beneficiary and beneficiary in fact was the child. Any benefit to religious institutions was "indirect," "remote," or "incidental."

(3) The benefits were clearly restricted to the secular. Enforcement of the secular limitation was within the control of public authorities and did not require supervision of nonpublic school personnel or records.

(4) The services were supplied in common to all students. Rather than creating special classes, competition and divisiveness, the programs treated all in common and alike, thereby creating equity and unity. Note: Justice Powell's analysis in *Nyquist, supra* at 2966-67 and 2970, footnote 38.

With this brief analysis, let us turn to the specifics of Title I ESEA.

(1) History and legislative intent of Title I.

The historical causes of the Elementary and Secondary Education Act were the historical causes of the War on Poverty. The intent was to break the "cycle on poverty" by providing special assistance to educationally deprived children in low-income areas.

When President Johnson delivered his education message to Congress on January 12, 1965, proposing Title I and other educational programs, he emphasized problems of school dropouts, and problems of unemployment, etc. 1965 Cong. Quarterly Almanac, p. 1374. In presenting Title I on the floor of the House of Representatives, the sponsors of the Bill called attention to national problems caused by basic educational deficiencies. They noted such

things as draft rejection rates, manpower retraining problems, unemployment rates, and the strong correlation between educational underachievement and poverty. 111 Cong. Rec. 5552 (1965). They expressed concern for the dropout problem. *Id.* at 5560. The Report of the Senate Committee reiterated these purposes. The Report states that the bill represents a national determination that "poverty no longer be a bar to learning, and learning shall offer an escape from poverty." Senate Report No. 146, 1965 U.S. Cong. and Adminis. News 1446 at 1449.

These purposes were summed up in a Congressional declaration of policy which is the first section of the Act, and declares a policy to financially assist local public school agencies which serve areas having a concentration of children from low-income families in order to expand educational programs which meet the special educational needs of educationally deprived children. 20 U.S.C., Sec. 241a.

(2) Title I grants funds to public agencies only and provides no direct assistance to nonpublic schools.

Title I funds are granted only to public agencies. 20 U.S.C., Sec. 241c. Control of funds, title to property and administration of the program is required to be in public agencies. 20 U.S.C., Sec. 241e(a)(3)(A). Unlike the statutes held unconstitutional by this Court, Title I makes no grant to a nonpublic institution, employee or patron.

In the words of Congressman Powell, Chairman of that Committee:

"The Bill does not authorize funds for the payment of private school teachers; nor does it authorize the purchase of materials or equipment or the construction of facilities for private schools. It specifically pro-

hibits any Federal funds being used for religious or sectarian purposes and clearly states that: "the local educational agency must provide satisfactory assurance that the control of funds . . . the title to property derived shall be in the public agency for the uses and purposes provided in this title and that a public agency will administer such funds and property." 111 Cong. Rec. 5558 (1965).

Congressman Perkins, sponsor of the bill, stated:

"No provision of the bill authorizes any grant for providing any services to a private institution. Nor does the bill authorize payment of private teachers. It does not authorize the purchase of materials or equipment or the construction of facilities for any private school." *Id.* at 5561.

This same understanding was expressed in the Senate. See: Senate Report No. 146, 1965 U.S. Cong. and Admin. News 1446 at 1456.

In an over-zealous effort to make a square peg fit a round hole, Petitioners' Brief makes several erroneous statements regarding the Title I ESEA program and the facts of this case. The first erroneous assertion is that Title I services are "basically everyday regular instruction in subjects such as reading and arithmetic, the same subjects taught in the private schools in *Lemon-DiCenso-Johnson* cases." (Petitioners' Brief, page 26.)

This statement is simply untrue. Title I does not provide general educational services to either public or private school children.

First of all, services are only available, "in school attendance areas having high concentration of children in low-income families." 20 U.S.C., Sec. 241e(a)(1). Fur-

ther see: 45 C.F.R., Sec. 116.17(d) and USOE Program Guide No. 44, Sec. 1.1. (Reprinted in USOE Handbook, pp. 39 and 40.) For example in the Kansas City Public School District there are 99 public schools, but only 22 are eligible attendance areas. There are 24 private schools in the Kansas City District, but only five of these enroll children who reside in the eligible attendance areas. (R. Vol. IV, Plaintiffs' Exhibit No. 7 offered in evidence R. Vol III, p. 64.)

Secondly, Title I only provides programs "which are designed to meet the special educational needs of educationally deprived children." 20 U.S.C., Sec. 241e(a)(1). The projects must be tailored to meet the special educational needs of educationally deprived children and "should not be designed to merely meet the needs of schools or of the student body at large in a school or in a specific grade in the school." 45 C.F.R., Sec. 116.17(g) and Sec. 116.19 (c). Educationally deprived children are expressly defined as those who need special educational assistance because of handicap, poverty, neglect, delinquency, cultural or linguistic isolation, or substandard educational attainment. 45 C.F.R., Sec. 116.1(i).

Thirdly, even special services may not be provided to either public or private school educationally deprived children if the service is already available to the child. Federal funds cannot be used to supplant state and local funds. 20 U.S.C., Sec. 241e(a)(3)(B). The regulations require that an assurance be made that Title I funds "will not be used to provide instructional or auxiliary services in project area schools that are ordinarily provided with state and local funds to children in non-project area schools." 45 C.F.R., Sec. 116.7(h). Additional limitations are prescribed regarding special services extended to educationally deprived children on private school premises. The

regulations require that Title I services be made available "only when such services are not normally provided by the private school." 45 C.F.R., Sec. 116.19(e). For another example of prohibitions against general assistance in connection with educationally deprived children enrolled in nonpublic schools, see: Program Guide No. 24, Sec. 10. (Reprinted in USOE Handbook, pp. 36 and 37.)

In the words of Congressman Carey, "This is not a general instruction bill for the use of nonpublic schools." 111 Cong. Rec. 5568 (1965). The Congressmen had clearly in mind the distinction between special and general educational services and that Title I was restricted to special services. *Id.*, 5568, 5572.

Petitioners also erroneously state that "mentally retarded or emotionally disturbed children are not eligible" to participate in Title I programs. (Petitioners' Brief, p. 12.) Quite to the contrary, the definition of "educationally deprived children" expressly includes "children who are handicapped" (45 C.F.R., Sec. 116.1(i)) and "handicapped children" are defined to include the "*mentally retarded*, hard of hearing, deaf, speech impaired, visually handicapped, seriously *emotionally disturbed*, crippled, or other health impaired children who by reason thereof require special education." 45 C.F.R., Sec. 116.1(o). Also note the expressed references in the Act to programs for handicapped children directly operated by state agencies, such as the Petitioners. 20 U.S.C., Sec. 241c(a)(5) and Sec. 244(6)(B). The reference to the Title I application of the St. Louis Public School District which the Petitioners cite (Petitioners' Brief, Appx. B, p. 44) states that the Title I program therein described will be available to eligible students who are not eligible for classes for the mentally retarded or emotionally disturbed. What this means is that a program for the mentally retarded and

emotionally disturbed is already provided through state and local funds and that the Title I program will not supplant this existing program.

Petitioners also erroneously state that Title I does not involve such services as "medical or dental care, breakfasts and lunches, or even psychological services." (Petitioners' Brief, p. 13.) To the contrary, note the testimony of Petitioners own Title I Coordinator. (R. Vol. III, pp. 162 and 163.) Also see: Illustrations in Senate Report No. 146, 1965 Cong. and Admin. News 1455. Petitioners own Title I application form enumerates the following services as fundable under Title I: attendance services, clothing, food, guidance counseling, dental services, medical services, library services, psychological services, social workers, speech therapy, transportation, special services for handicapped, etc. See for example: the document entitled, "Summary Sheet of Total Project Activities" contained in the Title I application of the Linn Public School District. (R. Vol. V, Plaintiffs' Exhibit No. 9, offered in evidence R. Vol. III, p. 106.)

In *Lemon* the state program paid nonpublic schools for teaching mathematics, modern foreign languages, physical science, and physical education, all courses which were part of the regular school curriculum. *Lemon*, *supra* at 610. In *DiCenso*, the state program paid a percentage of the regular nonpublic school teachers salary for teaching the regular courses, excluding only religion. *Lemon*, *supra* at 608. In *Levitt*, the state program paid for teacher-made tests which were part of the regular school program. *Levitt*, *supra* at 2816 and 2817. In *Nyquist* and *Sloan*, no limitation was made on the grants or tax benefits. Unlike these cases, Title I does not supplant regular services provided by nonpublic schools.

Citing the USOE Handbook, pp. 34 and 35, Petitioners' second erroneous assertion is that it is permissible to employ regular private school teachers to perform educational services under a Title I project. (Petitioners' Brief, pp. 10 and 26.) The regulations clearly prohibit paying of a salary of any employee of a private school for services rendered during regular duty hours. 45 C.F.R., Sec. 116.19 (e). (Note also the legislative statements quoted *supra*.) Petitioners' erroneous statement is apparently caused by their misunderstanding of USOE Program Guide No. 24, Sec. 9 (reprinted in USOE Handbook, pp. 34 and 35). That Program Guide does *not* deal with the employment of teachers, but rather with inservice training. That Guide states:

"Teachers who are regular employees of private schools may receive inservice training under Title I projects only if they are definitely committed to serving educationally deprived children in a Title I project and if the inservice training would assist them in so serving."

Obviously, a teacher employed by a public school district to teach in a Title I program would be entitled to participate in inservice training under Title I. The Program Guide does not deal with the obvious situation but rather with the unclear situation of whether teachers employed by a private school are eligible to participate in Title I inservice training projects. A person unfamiliar with the actual administration of Title I possibly would not see the difference.

Normally, a Title I program available to public school children is comprehensive and includes instructional personnel, supplementary services, equipment, materials, and supplies. However, occasionally the public school district applies for only equipment and materials under Title I

and provides personnel from other sources. For example, the Berkley Public School District operated an activity called "visual and verbal expression" for 30 public school children. The activity was staffed by four part-time teachers but the teachers were not paid by Title I funds. (R. Vol. VII, Defendants' Exhibit No. 10a, unnumbered page 29, offered in evidence R. Vol III, p. 108.) Although this practice is rare in public schools in Missouri because personnel paid out of Title I funds are freely available to public school children, it has been an almost universal practice in regards to educationally deprived children enrolled in private schools since the State prohibited them from receiving the benefits of Title I paid personnel. For example, Defendants' Abstract of the St. Louis Title I project states that educationally deprived children enrolled in nonpublic schools will participate by "considerable use of equipment and materials and remedial programs *staffed and operated by the nonpublic schools on their premises.*" (R. Vol. VI, Defendants' Exhibit No. 3, unnumbered p. 3, offered in evidence R. Vol. III, pp. 11 and 78. Emphasis added.) Also note all of the nonpublic school projects described in the Kansas City Title I Application involve only the lending of equipment and materials and are entirely staffed by the contributed services of nonpublic school teachers. (R. Vol. V, Plaintiffs' Exhibit No. 8, offered in evidence R. Vol. III, p. 144.)

It is this type of teachers who are paid by nonpublic schools or other non-Title I sources and contribute their services to Title I projects, to which Program Guide 24, Sec. 9 is addressed. Under no circumstances may Title I funds be used to pay the salary of a nonpublic school teacher. 45 C.F.R., Sec. 116.19(e).

Petitioners' next erroneous assertion is that Title I teacher aides may assist regular nonpublic school teachers. (Petitioners' Brief, page 36.) Even Petitioners admit that

the Program Guide forbids this but contend that the enforcement of the prohibition would require continual policing.

USOE Program Guide 24, Sec. 10 (reprinted in USOE Handbook, p. 36) expressly prohibits the assignment of a teacher aide to provide general assistance to a nonpublic school teacher even if the nonpublic school teacher performs functions with respect to a Title I project. The enforcement of this prohibition requires no policing because the prohibition is not against the activities of the teacher aide, but against the aide being there in the first place. The only time a teacher aide may be made available on private school premises is when the person is an aide to a Title I paid teacher in which case both persons are under the direct control and supervision of the LEA, the public agency.

"No provision of the Act authorizes any grant for providing any service to a private institution. . . ." Senate Report No. 146, 1965 Cong. and Admin. News 1446 at 1456.

(3) Title I limitations to the secular are clearly demarked and enforceable without "excessive entanglement."

In *Nyquist-Sloan-Levitt*, this Court invalidated state statutes because they provided unrestrictive grants to private institutions or affiliated persons. "There has been no endeavor 'to guarantee the separation between secular and religious educational functions to insure that state financial aid supports only the former.'" *Nyquist, supra* at 2970-71 (quoting *Lemon*).

Title I grants funds to public agencies and *only public* agencies for the purpose of providing benefits meeting

the special needs of educationally deprived children in low-income areas wherever such children may be found—in a public school, in a nonpublic school, or out of school. 20 U.S.C., Sec. 241a and Sec. 241e(a)(1) and (2). Control of funds, title to property, and administration of Title I programs is expressly limited to public agencies. 20 U.S.C., Sec. 241e(a)(3)(A). Salaries of nonpublic school teachers are not paid. 45 C.F.R., Sec. 116.19(e). Because the operation of Title I is solely vested in public agencies, restriction to secular functions is inherent. However, even further precautions to restrict Title I solely to secular functions have been taken by the U. S. Commissioner in his regulations and criteria.

Some examples: Construction of private school facilities is prohibited. 45 C.F.R., Sec. 116.19(e); USOE Program Guide No. 24, Sec. 2. (Reprinted USOE Handbook, pp. 29 and 30.) Although equipment may be permanent when used on public school premises, it must be mobile or portable when used on private school premises. 45 C.F.R., Sec. 116.19(e). Although Title I equipment may be used by the public schools for non-Title I purposes so long as the use does not interfere with Title I purpose, equipment made available to private school students may only be used in connection with the approved Title I project. 45 C.F.R., Sec. 116.20(a); USOE Program Guide No. 24, Sec. 5. (Reprinted USOE Handbook, pp. 30 and 31.) Although equipment is retained on public school premises at the end of a Title I project, equipment placed on private school premises must be removed at the end of the project. 45 C.F.R., Sec. 116.20(b). Where equipment is placed on private school premises, a more complete inventory is required to be kept by the public agency. 45 C.F.R., Sec. 116.55. Title I may include a work-study activity, but in the case of children attending private schools, additional

restrictions are imposed. These restrictions are: the work services may not be related to religious instruction or worship; may not enhance the value of the private school premises nor supplement activities normally financed by the private school. USOE Program Guide No. 24, Sec. 1. (Reprinted USOE Handbook, p. 29.) While the teacher aides paid for under Title I may be used to free a regular public school teacher, such aides cannot be used to relieve nonpublic school teachers, even to allow the teacher to perform functions with respect to a proper Title I project. USOE Program Guide No. 24, Sec. 10. (Reprinted USOE Handbook, p. 36.) And, of course, no Title I funds may be used either on public or nonpublic premises for religious worship or instruction. 45 C.F.R., Sec. 116.53(e).

In short, the separation of the secular from the sectarian is clearly identifiable in Title I programs.

In *Lemon-DiCenso-Sanders*, this Court struck down state statutes for the reason that although the legislature had taken precautions to restrict assistance to the secular functions "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to insure that these restrictions are obeyed in the First Amendment otherwise respected." *Lemon, supra* at 619.

Petitioners contend that the assignment of Title I teachers to provide services on private school premises will require this kind of surveillance and thereby violate this Court's "excessive entanglement" test.

First of all, unlike *Lemon-DiCenso-Sanders*, under Title I no funds or property is granted to a private institution or employee thereof. Therefore, no accounting is maintained by a private institution. Simply no occasion exists for governmental examination or audit of the records of private institutions.

In *Lemon-DiCenso-Sanders*, the teachers were the regular employees of the nonpublic school. The power to hire and fire was in nonpublic school officials. The day-to-day supervision and control of these teachers was also in nonpublic school officials. The Court noted that in almost all cases, the teacher was of the same religion as that which sponsored the school. The subjects that the teacher taught were the regular courses of general instruction and selected by the administration of the nonpublic school. Public paid services supplanted part of the regular school curriculum. None of these factors exist in regard to Title I personnel.

The Title I teacher, therapist, social worker, etc. who serves educationally deprived children, whether they be enrolled in public or private schools, is the employee of a public agency. The public board of education has the power to hire and fire, to supervise and control that employee. For the public board of education to give preference on the basis of religion whether the children served were enrolled in public or private schools would be in violation of the Missouri Constitution, the Missouri Fair Employment Practices Act, and federal laws. Article I, Sec. 5, Missouri Constitution; Sec. 296.020, RSMo. 1969. Services offered to children enrolled in private schools are not part of the regular curriculum of that school, not only is it prohibited to provide services that are normally provided by the private school (45 C.F.R., Sec. 116.19(e)) but further in every case Title I services are directed to meet the special educational needs of the educationally deprived child rather than the needs of the student body at large or a specific grade or class. 45 C.F.R., Sec. 116.17(g), and Sec. 116.19(c).

Without realizing it, Petitioners in their brief have expressed the real distinction that exists here. In Petitioners'

words, ". . . the Establishment Clause forbids entanglement of the state with religious institutions; it *does not forbid entanglement with its own institutions.*" (Petitioners' Brief, page 35. Emphasis added.)

If the state were to place government inspectors in every Title I classroom to audit the instruction given therein to assure that no religious inculcation occurs, those inspectors would not be inspecting nonpublic schools or their employees, but the government's *own* employees and services.

Petitioners have asserted that Title I personnel will be recruited by private school authorities and only technically be employed by the LEA. (There is no evidence that such a practice ever has or ever would occur in Missouri.) However, if such a practice did occur, it would be because the LEA failed to carry out its legal responsibilities, in which case the state educational agency or the United States Office of Education can force the LEA's compliance to the law. In such a case, the relationship would be only between public agencies.

To paraphrase this Court's statement in *Allen, supra*, at 245, "Absent evidence we cannot assume that (public) school authorities, who constantly face the same problem in selecting (instructional programs) for use in public schools, are unable to distinguish between secular and religious (instruction) or that they will not honestly discharge their duties under the law."

When Title I personnel provide services on private school premises, most commonly the classroom or other facility is contributed by the private school. Respondents do not believe the minimal arrangements necessary to provide the physical space necessary to conduct the instruction arises to the level of "excessive entanglement." But, if the lack of public dominion over the physical space

presents a problem, it is a simple matter for the public agency to lease the space from the private school and thereby obtain legal control. (For guidelines regarding leasing the private school premises see: USOE Program Guide No. 24, Sec. 7, Reprinted USOE Handbook, pp. 32-34.) This is the type of arrangement that was used with approval in *Nebraska State Board of Education et al. v. School District of Hartington, etc.*, 409 U.S. 921. Another option is to provide services to educationally deprived children enrolled in private schools by offering them in a self-contained mobile unit that is placed adjacent to the private school premises. USOE Handbook, p. 11.

(4) Title I serves all children and does not create a special beneficiary class based on religion or school attendance.

The common defects in *Lemon-DiCenso-Sanders* and *Levitt-Nyquist-Sloan* is that the legislation created a special beneficiary class. In those cases, "the state has singled out a class of citizens for a special economic benefit." *Sloan*, 93 S.Ct. 2982, 2986. "... it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor." But contra-wise, the services provided in *Allen* and *Everson* were provided "in common to all students." *Lemon*, *supra* at 616. And this is true of Title I. Title I does not create a special beneficiary class along religious lines. It clearly provides a program to meet the special needs of educationally deprived children in low-income areas without regard to where or whether they go to school. Title I does not create competition between public and nonpublic schools for public funds, since all children are treated alike, and based solely on their need. In fact, such legislation has created unity among educators and is the antithesis of political divisiveness.

(5) **The LaNoue Paper, on which State Board rests its Argument, provides neither evidentiary basis nor legal authority for the position of the State Board of Education.**

In its Brief, the State Board cites and quotes extensively from the paper of George LaNoue, *Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities*, 22 Rutgers Law Review 219 (1968). This paper purports to analyze the operations of Title I in New Jersey in the early years of Title I.

It is most important to observe that the materials contained in the paper, which are represented as based on investigation, are materials that have no place at all in the record of this lawsuit, because they were never received as evidence in the case. Furthermore, the vast bulk of the materials could never have been admitted as evidence in proceedings, not only because they were highly conjectural and speculative, but because they were based upon the most ephemeral sort of hearsay. Some of the conversations were related third and fourth hand.

LaNoue's own background and predictions scarcely qualify him as an impartial observer. He had long been active in American Civil Liberties Union. (Hearings Before the Subcommittee on Education on H.R. 2361 and 2362, pages 1659, 1670.) The Rutgers study was sponsored by American Jewish Congress and the Civil Liberties Union (22 Rutgers L. Rev. 219), both of which oppose the claims of the educationally deprived children in private schools in the case. LaNoue appeared before the Subcommittee to oppose the enactment of 20 U.S.C., 241(a)(2) as it was drawn and submitted to the Congress, and sought to limit the participation of private school children. Hearings, 89th Cong. H.R. 2361, 1670, 1671. Neither of LaNoue's amendments were adopted by the Congress.

While the LaNoue Paper is now characterized as a "careful study of Title I programs" (Pet. Br. 11), the first fifteen pages are merely an argument as to the constitutionality of the participation of private school children in public educational benefits. We have demonstrated that the Congress was painstaking in its effort to provide special educational benefits to the disadvantaged private school child under Title I, and that the Commissioner carefully followed the legislative mandate in formulating Regulations and Guidelines. Similarly, the Congress and the Commissioner displayed great caution in prohibiting direct aid to private schools. Nevertheless, LaNoue continues throughout his paper to refer to Title I as "aid to parochial schools," p. 220, "public aid to parochial schools" p. 223, and questions the integrity and sincerity of the Congress and the Office of Education when the government maintains that the Title I benefits are for the child and not the parochial school, pp. 225, 234. LaNoue finally hoists his true colors and designates the parochial schools as the "real enemy" of groups concerned with public education and the separation of church and state, p. 261.

One of the so-called "findings" of the LaNoue Paper certainly compels a far different conclusion than that postulated by the writer. On page 260, LaNoue takes to task the several attorneys for the New Jersey school districts for not testing the constitutionality of Title I participation by private school children. LaNoue seems to charge them with indifference, incompetence, political pressure or perhaps something to do with the attorney's "life." Really, is it not much more plausible to conclude that the School Board attorneys of New Jersey, like the Congress, like the United States Court of Appeals for the Eighth Circuit, like the Attorney General of Missouri, like the Attorneys of both Department of Justice and H.E.W., have correctly decided and concluded that the

rendering of special educational services to private school children in their schools is constitutional?

LaNoue discovered that the State Attorney General was requested to rule on the constitutionality of providing Title I services on private school premises, and LaNoue emphasizes the importance of a ruling by the Attorney General of the State, pp. 262, 263. Although the Attorney General of New Jersey did not rule, we must observe that the Attorney General of Missouri did issue a clear and formal opinion in which he determined that furnishing Title I services to disadvantaged children on private school premises was not in violation of constitutional principles. (Pet. Writ A 20.)

We submit that the LaNoue Paper is both an improper attempt to inject into evidence facts which are totally inadmissible as evidence and also a citation to an authority which is so partisan and argumentative that it can carry no weight whatsoever.

For all of the reasons stated, Respondents respectfully submit that the providing of special services to educationally deprived children by Title I personnel on private school premises does not offend the Establishment Clause. The historical causes and legislative intent are valid public and secular causes and purposes. No direct cash payment or other assistance is provided to any nonpublic institution or its employee. The services are clearly limited to the secular and enforcement of these limitations involves a relationship between public agencies and public employees and not any "excessive entanglement" with religion. The providing of these services equitably to all children in common based on their needs tends to be unifying rather than divisive.

III

In frustrating the purposes of the act and in denying the benefits of Title I, ESEA, to educationally deprived children in private schools, the State Board of Education, its members and officers, are not protecting any lawful or constitutional interest of theirs and have no standing to contest the constitutionality of Title I, ESEA, and its educational programs: the State Board of Education has not preserved, and does not present, any substantial constitutional issue which is properly before the court for determination.

A. The State Board of Education has no standing to challenge the constitutionality of Title I, ESEA, or of its programs.

The Respondents are the State Board of Education, its members and Commissioners. The actions of these Respondents in the implementation of Title I, ESEA, have had as a purpose the withholding of educational benefits from educationally deprived children in private schools. The necessary effect of these actions of the State Board is that coercion is exerted on private school children and their parents to withdraw from private schools and to enroll in public schools. The United States Court of Appeals clearly spelled out the nature of the inequities and injustices perpetrated on the private school children, *Barrera v. Wheeler*, 475 F. 2d 1338, 1344, 1345, 1346, 1347, 1348, 1355, 8th Cir. (1973). (Pet. Writ A1, A10, A12, A13, A15, A16, A29, A30.) Indeed, the State Board of Education does not seriously contend that comparable educational benefits are provided private school children in Missouri, and does not even suggest that these children are provided genuine opportunities to participate in Title I programs. The State Board of Education seeks to justify its untoward posture in the case by charging that Title I, ESEA,

programs which require the public school teacher to render special educational services to educationally deprived children on private school premises are unconstitutional.

The record herein is completely devoid of any suggestion of any sort of right or interest or privilege of the State Board of Education, its members and Commissioners, which is diminished or jeopardized by the operation of Title I, ESEA, as designed by the Congress and regulated by the Department of Health, Education, and Welfare. Such facts distinguish the case from *Board of Education v. Allen*, 392 U.S. 236 (1968), where the State officials had the risk of removal from office if they failed to carry out the provisions of the Statute. (The question of standing does not appear to have been squarely before the Court in *Board of Education v. Allen*, *supra*, so that further distinctions cannot be observed.) It must be pointed out further that the New York Court had held that the State Agency did have standing under State law in the *Allen* case.

This Court has relied on the decisions of State law in determining the standing of State officers to test the constitutionality of Statutes and regulations. This was the holding in *Smith v. Indiana*, 191 U.S. 138 (1903), where a county officer refused to deduct the amount of a mortgage from the assessed value of property, as a State Statute required, and the county officer charged that the Statute was unconstitutional. The Supreme Court of the United States refused to pass on the constitutionality of the Statute and stated, page 139:

"It is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event, it is a purely local

question, and seems to have been so treated by this court in *Huntington v. Worthen*, 120 U.S. 97. . . . It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz, the taxpayers, and in this particular the case is analogous to that of *Caffrey v. Oklahoma*. . . . We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision."

This Court took the same view in the later case of *Stewart v. Kansas City*, 239 U.S. 14 (1915). There a County Treasurer challenged the constitutionality of a State Statute, and it was stated, page 16:

"Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the state, he yet attempts to resist one of its laws. Whether he may do so is purely a local question."

There is no doubt that Missouri law clearly provides that State ministerial officials have no standing to test the constitutionality of ordinances under which they perform their duties. The Supreme Court of Missouri has

held that such is the law. *State of Missouri ex rel. St. Louis County v. Kelly*, (Mo. S.Ct.) 377 S.W. 2d 328 (1964).

There is a clear and compelling logic to the rule that state agencies and officers, acting in their official capacity only, may not challenge the laws and rules under which they operate. The sense of this rule is highlighted by the facts of this case. Here the United States distributes at least \$23,000,000.00 to the State of Missouri annually (Record Vol. III-164), and requires that it be used for the purposes set forth in the Statute and that the State Board of Education provide assurances as to the use of these funds. 45 C.F.R., Section 116.19, Section 116.31. The State Board of Education has accepted the "annual largesse from Washington," as the District Court termed the Title I grant, (Pet. Writ A44), and simply proceeded to implement the Act as it wished. Over the years it has expended over \$190,000,000.00 in Title I funds, and has interpreted its duties according to its own whims and prejudices. It should not be permitted now to challenge the constitutionality of the Federal Statute or the operation thereof.

This Court has traditionally held that state officers could not contest the constitutionality of the Statutes under which they perform their duties. In *Columbus and Greenville Railway Company v. Miller*, 283 U.S. 96, (1931) this Court considered the question of the standing of the state officer to complain of a constitutional question. In resolving the issue against the state officer, the Court stated, L.c. 99:

"... While so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the Federal question by this court, that the protec-

tion of the 14th Amendment against state action is only for the benefit of those who are injured through the invasion of personal or property rights or through the discrimination which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

Consistent with the traditional holdings on this point, in *Tennessee Power Electric Company v. Tennessee Valley Authority*, 306 U.S. 118 (1939), the complainants contended that the statutory plan for the Tennessee Valley Authority Act was unconstitutional, and they further contended that their rights would be violated by the Tennessee Valley Authority acting pursuant to the Statute. The Court held that any infringement or injury was too contingent and remote to give standing to attack the constitutionality of this Statute, stating, l.c. 137:

"The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be in violation of his legal rights, may challenge the validity of the statute in the suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on the statute which confers a privilege."

The rule should be even more strictly defined in this matter where the State agency and State officers are challenging a Statute of the United States under which they not only have sustained no damage but in fact have reaped substantial benefits.

Of necessity the question forces itself upon us: What is the position and purpose of the State Board of Education in this matter? If the State Board of Education properly implements Title I, ESEA, and provides lawful benefits to private school children, it sustains no damage; the State Board simply complies with the requirements of the Statute. The only consistency in the position of the State Board lies in its grim determination to deprive private school children of the educational benefits provided for them in Title I, ESEA. This unyielding reluctance to comply with the terms of the Statute does not justify an attack on such meritorious and successful programs as those provided by the Congress in the Elementary and Secondary Education Act.

B. There does not exist a justiciable controversy on any constitutional issue which is now ripe for determination.

In its Petition for a Writ of Certiorari the State Board raised the question of the Establishment Clause as it may affect the requirement that Title I teachers render educational services on private school premises. (Pet. Writ 2.) The State Board now presents that issue in its Brief (Pet. Br. 26), and seeks to develop the issue by imaginative and conjectural observations as to the most remote possibilities which could occur. (Pet. Br. 33-42.) The only authority cited for these hypothetical occurrences is the rather suspect polemic of George R. LaNoue, 22 Rutgers Law Review 219 (1968).

We submit that the Establishment Clause is not a proper issue in this case, and that there is no such issue ripe for determination by this Court.

First let us review the Record. In its rather lengthy Answer (App. 20), the State Board asserted many de-

fenses, all of which were properly held to be unsupported by evidence or in law. Paragraph 22 (App. 33) pleads that the Constitution, laws and public policy of the State of Missouri forbid assignment of public school teachers to private schools. This paragraph follows the theme of the Answer, as well as the position of the State Board throughout the case,—that the laws of the State of Missouri properly override the Federal Act. Paragraph 23 of the Answer refers to a constitutional construction of the Statute, but does not plead the United States Constitution or any Article or Section thereof. *Throughout the Answer of the State Board, no reference is made to the First Amendment of the Constitution of the United States.*

It came as no surprise that the District Judge, even in finding for the State Board of Education, was compelled to observe (Pet. Writ A 44) that:

“The defendants, who undoubtedly welcome this twenty-five to thirty million dollar annual largesse from Washington, have carefully skirted the question by simply stating that they do not question the constitutionality of Title I as interpreted by defendants. . . .”

Thus, there was really no genuine issue of the Establishment Clause presented in the District Court.

The Court of Appeals opinion consisted of an exhaustive and definitive review of Title I, ESEA, and of the facts of the case. The position of the State Board that the Title I funds could be used by the State Board as state funds was rejected. (Pet. Writ A 24.) The Court of Appeals explained that the Statute and the Regulations had a clear and unequivocal meaning and purpose, and that educationally deprived children in Missouri could no longer be discriminated against and deprived of the special educational benefits simply because they did not attend public schools. The Court observed that Title I author-

izes special educational services, as distinguished from general educational aid, to be rendered on private school premises. *Barrera v. Wheeler*, 475 F. 2d 1338, 1353, 8th Cir. (1973). (Pet. Writ A 24, A 25.) The Court's opinion was that where special services were rendered public school children, comparable services must be provided the disadvantaged private school child, p. 1353. (Pet. Writ A 25.)

The Court of Appeals held that there was no definite or particular program or service presented to the Court for review or decision. The abstract and hypothetical situations now suggested by the State Board of Education—making public school teachers wear hats in Jewish schools, the attendance of Title I public school teachers in religious schools on religious holy days (Pet. Br. 39), the religious proclivity (or lack of it) of the public school Title I teacher—surely do not present substantial constitutional questions. The Court of Appeals properly declined to conjecture on such speculative circumstances, and proceeded to rule on the basis that the law was clear and that the evidence clearly established the refusal of the State Board of Education to recognize the lawful interests of the educationally deprived and culturally disadvantaged children in private schools. (Pet. Writ A 15, A 15 note 13.) This finding and determination was based upon testimony, evidence, and fact, not upon surmise, conjecture and supposition. The decision required the State Board of Education to comply with the directions of the Congress, and pointed out that when the special needs of educationally deprived children require it, special teaching services shall be furnished on private school premises.

The State Board of Education continues and persists in its efforts to deny private school children the benefits of the Statute. That position prompts the resort to the

charge that the implementation of Title I in Missouri violates the Establishment Clause, and the State Board seeks a decision on the hypotheses which it poses. These present no constitutional issue. This Court, in *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947), stated:

"The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."

More recently, in *United States v. Raines*, 362 U.S. 17, 21, this Court stated:

"Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . Citing cases. . . . In *Barrows v. Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and

comprehensive legislation.' *Id. 346 U.S. at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. . . ."

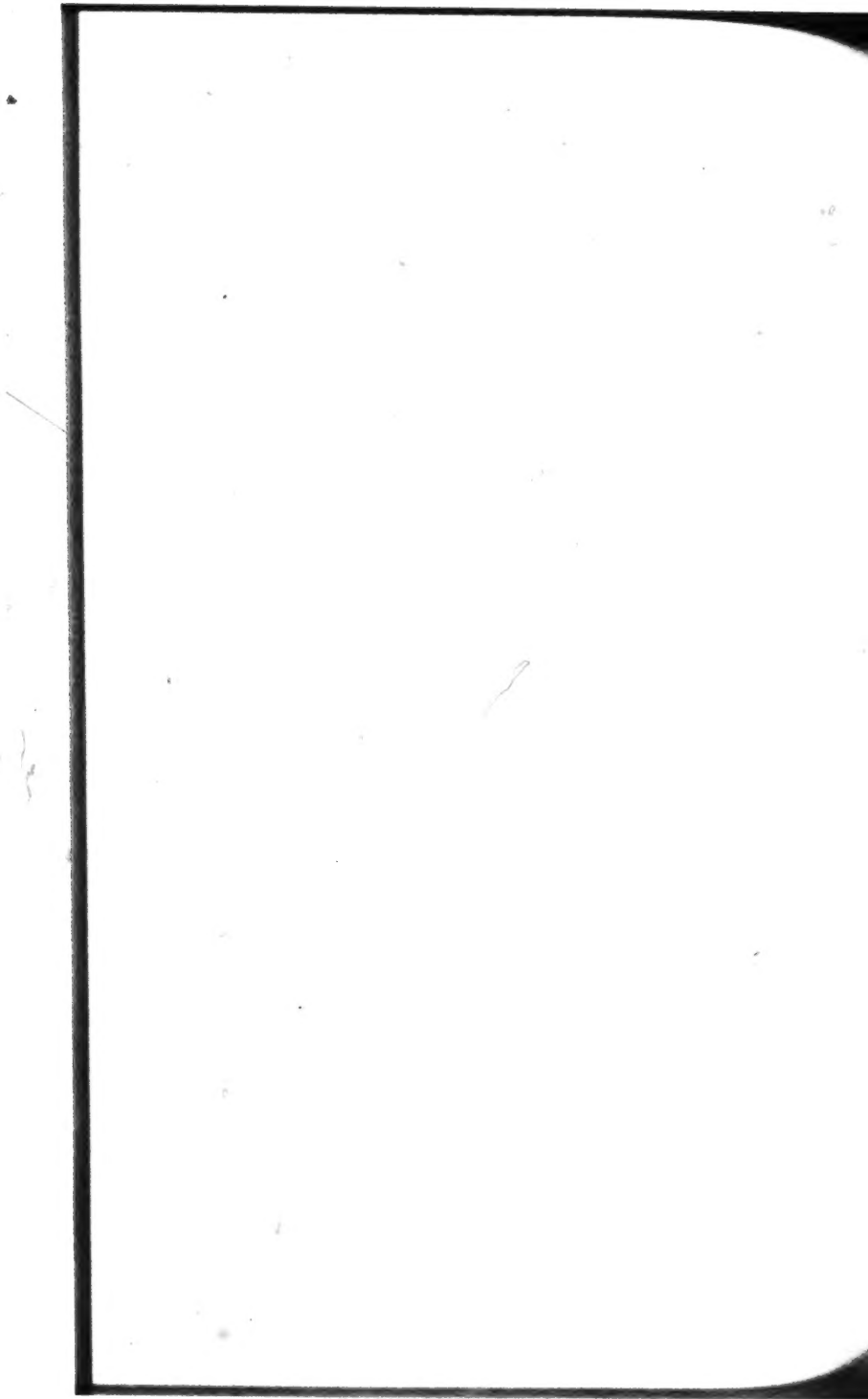
The constitutional question upon which the State Board now seeks to use to excuse its flagrant violation of the Statute is not "presented in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). The State Board of Education is not entitled to be relieved of their wrongdoing by raising the issue of the Establishment Clause at this time.

CONCLUSION

For the foregoing reasons, Respondents pray that the Writ be dismissed or in the alternative that the decision of the Eighth Circuit Court of Appeals be affirmed.

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APPENDIX

USOE SURVEY OF TITLE I PROGRAMS

The responses on the following pages were given in answer to five questions directed to each State Educational Agency in reference to Title I of the Elementary and Secondary Education Act. The questions are as follows:

1. Do State statutes permit (i.e. not forbid) private school children to participate in dual enrollment or shared time programs during the regular school day?
2. Is dual enrollment used as a matter of practice in Title I programs in your State?
3. Do State statutes permit (i.e. not forbid) Title I instructional services to be provided on the premises of private schools during regular school hours?
4. In practice, are Title I instructional services provided on the premises of private schools during regular school hours?
5. What other means do you use to provide Title I services to private school children during the regular school day?

This information represents a telephone survey of State Educational Agency program officials as they understand the operation of their state's law and the Title I programs in their state. No further attempt was made by the United States Office of Education officials to verify the accuracy of this information.

State	Question No. 1	Question No. 2	Question No. 3	Question No. 4	Question No. 5
Alabama	Yes	No	Yes	Yes	Supplies and materials— Inservice training—sup- portive services
Alaska	Yes	No	Yes	Yes	None
Arizona	Yes	Yes	Yes	Yes	Portable facilities—Ma- terials and equipment— Testing and counseling— Aides
Arkansas	Yes	Yes	Yes	Yes	Supportive services
California	Yes	Yes	Yes	Yes	Yes—rented neutral space and portable facilities
Colorado	No	No	Yes	Yes	Portable facilities—Aides —Testing and Counseling —Materials and equip- ment
Connecticut	Yes	Yes	Yes	Yes	None
Delaware	Yes	No	Yes	Yes	Materials and equipment
Florida	Yes	Yes	Yes	Yes	Materials and equipment— tutorial services—sup- portive services—trans- port children to public schools for Title I services
Georgia	Yes	Yes	Yes	Yes	None
Hawaii	Yes	Yes limited	Yes	No	None
Idaho	Yes	No	Yes	Yes	Materials and equipment— testing and counseling
Illinois	Yes	Yes	No	No	None
Indiana	No	No	Yes	Yes	None
Iowa	Yes	Yes	Yes	Yes	Materials and equipment
Kansas	Yes	Yes	Yes	Yes	Materials and equipment
Kentucky	Yes	Yes	Yes	Yes	None
Louisiana	Yes	Yes	Yes	Yes	Inservice training—sup- portive services
Maine	Yes	Infrequent	Yes	Yes	None
Maryland	Yes	No	Yes	Yes	None
Massachusetts	Yes	Yes limited	Yes	Yes	Shared facilities
Michigan	Yes	Yes	Yes	Yes	Shared field trips
Minnesota	Yes	Yes	Yes	Yes	None
Mississippi	Yes	Yes	Yes	Yes	None
Missouri	No	No	No	No	Inservice training—ma- terials and equipment
Montana	Yes	Yes	Yes	Yes	Rented neutral space
Nebraska	Yes	Yes	Yes	Yes	None

Nevada	Yes	No	Yes	Yes	None
New Hampshire	Yes	Yes	Yes	Yes	None
New Jersey	Yes	Yes	Yes	Yes	None
New Mexico	Yes	Yes	Yes	Yes	Inservice training
New York	No	No	Yes	Yes	None
North Carolina	Yes	Yes	Yes	Yes	Tutorial services
North Dakota	Yes	No	Yes	Yes	None
Ohio	Yes	Yes	Yes	Yes	District co-ops
Oklahoma	Yes	Yes	No	No	Medical and dental services—testing and counseling
Oregon	Yes	No	Yes	Yes	None
Pennsylvania	Yes	Yes (uncommon)	Yes	Yes	None
Rhode Island	Yes	Yes	Yes	Yes	None
South Carolina	No	No	Yes	Yes	Inservice training
South Dakota	Yes	Yes	Yes in leased space	Yes	Rented or leased neutral space—materials and equipment
Tennessee	Yes	No	Yes	Yes	Tutorial services—counseling services
Texas	Yes	Yes	Yes	Yes	None
Utah	Yes	Yes	Yes	Yes limited	Materials and equipment
Vermont	Yes	No	Yes	Yes	None
Virginia	No	No	Yes limited	Yes limited	None
Washington	Yes	Yes	Yes	Yes	None
West Virginia	Yes	No	Yes	Yes	None
Wisconsin	Yes	Yes	Yes in leased space	Yes	None
Wyoming	Yes	No	Yes	Yes	Aides

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, etc., et al.,
Petitioners,

v.

ANNA BARRERA, etc., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**BRIEF OF PARENTS RIGHTS, INC., AND THE
LUTHERAN CHURCH—MISSOURI SYNOD,
AMICI CURIAE**

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent statutory provisions, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the petitioners and the respondents. The amici curiae accept them for purposes of this brief. Both parties have consented to the filing of this brief by the amici curiae.

THE INTERESTS OF THE AMICI CURIAE

Parents Rights, Inc. is a not-for-profit organization whose purpose is to promote through the legislative and judicial processes programs which extend a fair share of public educational benefits to those parents who choose to educate their children in non-public schools. The legislation challenged in this suit by petitioners is of the type sponsored by this amicus.

The Lutheran Church—Missouri Synod is a worldwide organization of congregations consisting in membership of nearly 3 million people. Many of these congregations support and operate approximately 1,300 elementary and secondary schools within the United States. All of these schools are nonprofit, tax exempt, and adhere to the Civil Rights Act. One-third of the nearly 165,000 pupils enrolled are children of parents who are not members of the congregations which operate these schools; 10% of the enrollment constitutes children from minority groups. The Lutheran Church—Missouri Synod believes that parents are responsible for the education of their children, and that, together with the Church, they can provide a quality program of Christian education for the children of parents who desire an educational alternative that provides for spiritual and moral development. The Church is very concerned that the rights of the children who attend these schools are in no way curtailed through court action that would declare them ineligible for federal aid to education.

SUMMARY OF ARGUMENT

Denial of educational benefits to those who choose religiously-oriented schools constitutes an unlawful condition upon their First Amendment rights, and violates the principle of neutrality toward religion by influencing that choice. The Supreme Court has heretofore not taken into consideration these

claims, and instead has only concerned itself with possible Establishment Clause violations, some of which are not even worthy of consideration, and all of which are answerable. If the guarantee of religious liberty embodied by the Free Exercise Clause of the First Amendment is to continue to have meaning, then the Court must reverse its recent decisions and adopt an equitable policy in regard to religiously-oriented schools.

PRELIMINARY STATEMENT

Petitioners argue in their brief (p. 26) that this case is indistinguishable from *Lemon v. Kurtzman* and *Earley v. Di Censo*, 403 U.S. 602 (1971) in that the type of aid involved here differs only technically from that which was held violative of the Establishment Clause in *Lemon-Di Censo*. Petitioners also cite the recent decisions in *Levitt v. Committee for Public Education and Religious Liberty*, 93 S. Ct. 2814 (1973), *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955 (1973), and *Sloan v. Lemon*, 93 S. Ct. 2982 (1973). The Title I program is an auxiliary rather than fundamental aid program, and as such could be found permissible as were textbooks in *Board of Education v. Allen*, 392 U.S. 236 (1968). The purpose of this brief, however, is not to distinguish the aforementioned cases, but rather to challenge the validity of the basic principles on which they rest.

It is submitted that the principles of *Lemon-Di Censo*, *Levitt*, *Nyquist* and *Sloan* comprise a gloss on the First Amendment, the effect of which is to nullify the Free Exercise Clause, or at least to render it subservient to the Establishment Clause in those areas in which the two Clauses conflict. While there has been frequent mention of the "complexity" of the aid to non-public school question, the majority opinions in these cases are more indicative of predispositions than of thoughtful analysis. In contrast, the dissenting opinions in *Levitt*, *Nyquist* and *Sloan*

take cognizance of the basic inequity inherent in the denial of public educational benefits to taxpayers who choose to educate their children in non-public schools, a choice guaranteed them by *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). More important than the specific issue of the validity of the Title I program is the formulation of a policy by this Court which takes into account certain essential First Amendment rights of non-public school parents and children. Therefore the following discussion will treat this broader question rather than the particular merits of the instant case.

ARGUMENT

I. The Denial of Public Educational Benefits to Those Who Choose Religiously-Oriented Schools Constitutes an Unlawful Condition Upon the Exercise of Their First Amendment Rights.

Pierce v. Society of Sisters established the prime right of parents to educate their children as they see fit. When parents and their children choose religiously-oriented education their action is afforded the additional protection of the Free Exercise Clause. In practice, however, this right is not absolute. Those who choose non-public schools are denied a share of public educational benefits; they are also denied any relief from the tax burden imposed on them to support the public schools. The denial of public benefits for exercising First Amendment rights indirectly infringes upon those rights. In **Speiser v. Randall**, 357 U.S. 513 (1958), the Court, in striking down a California statute which denied a veteran tax exemption to persons who refused to subscribe to a loyalty oath, said:

"It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in this argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech." At p. 518.

In **Sherbert v. Verner**, 374 U.S. 398 (1963), a landmark religious liberty case, the Court held that the government not only may not refuse a benefit for exercising one's rights, but that it must also make exception for those people who, due to their beliefs, are unable to avail themselves of a benefit.

In **Sherbert**, a member of the Seventh-Day Adventist Church in South Carolina was discharged by her employer because she

would not work on Saturday, the Sabbath Day of her faith. She filed for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. The State Employment Security Commission denied her the benefits because she had failed to accept "suitable work when offered," an eligibility requirement of the Act. The Commission's ruling was upheld by the South Carolina Court.

Upon appeal to the Supreme Court, the decision was overruled. The reversal was based on this reasoning by the Court:

"We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For 'if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' *Braunfeld v. Brown*, 366 U.S. 599 at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 403-404.

Further, at pg. 406, the Court said: "Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalized the free exercise of her constitutional liberties."

Undeniably, many of those who choose religiously-oriented schools do so out of conscience. By comparison, the pressure on them to violate their conscience is far greater than on the Seventh-Day Adventist because the benefit involved is so much greater—thousands of dollars per child versus some twenty-two weeks unemployment payments. Clearly, the principle enunciated in *Sherbert* is irreconcilable with the Court's present position in regard to non-public schools.

II. Extending Public Educational Benefits to Those Who Choose Religiously-Oriented Non-Public Schools Does Not Violate the Establishment Clause.

The reasoning behind *Lemon-Di Censo*, *Levitt*, *Nyquist* and *Sloan* is that the various aid programs violate the Establishment Clause in that they (1) have a primary effect which advances religion, (2) they create excessive entanglement between Church and State, and (3) they foster political divisiveness.

The advancement of religion argument is based on the notion that aiding non-public schools or those who choose them amounts to a subsidy to religion or the exercise thereof. To subsidize something implies the giving of a special benefit. Public education, with its universal availability, cannot be considered a special benefit, thus the extension of public educational benefits is in the nature of a right, not a special benefit. If the government did not finance public schools, then a special grant for religiously-oriented education would indeed constitute a subsidy to religion. Parents who pay taxes for public schools, yet choose religiously-oriented non-public schools, must be quite

weary of hearing programs which are designed to relieve their burden described as subsidies.

This approach also disposes of the argument that no one should be taxed to support the religious activities of others. If public educational benefits are viewed as a right available to all and supported by everyone's taxes, then what concern is it to others that some use these benefits to obtain a religiously-oriented education? But, they contend, the public schools are open to all, if they want something extra, let them pay for it. It is not a question of wanting something extra, but rather something different. Those who choose religiously-oriented education want the same amount and type of secular education taught in the public schools, but instead of the "neutral" or secularist philosophy inculcated in the public schools, they may want Catholic, Lutheran or Jewish doctrine. Does this mean that they should be forced to forfeit all public educational benefits? Apparently the Court sees no injustice resulting from such a conclusion.

The principle that no one should be taxed to support the religious activity of others is not an absolute principle. If our country had a totally socialized economy, then obviously public money would have to be allocated to finance all religious activities. Our country, like many others, has become progressively socialized, particularly in the area of education. Since most families can budget only a certain amount for education, if that amount is taken through taxation to support the public schools, they are forced to look to the government for allowances for non-public schools. While it has never been fair to deny educational benefits to those who choose non-public schools, it was possible until recently for most families to avail themselves of this choice through personal sacrifice. Now, with education costs spiralling, relatively few can afford non-public schools, a fact evidenced by the large number of schools closing. If some relief is not granted soon, the vast

majority of non-public schools will close, leaving only the wealthy with the choice guaranteed them by *Pierce v. Society of Sisters*.

Nor does it follow that since those without children pay school taxes but receive no benefit, those who choose non-public schools likewise have no grievance. The latter are part of the class that is capable of sharing in the benefit, while those without children are incapable of receiving direct personal benefit.

Excessive entanglement between Church and State is concededly undesirable for both institutions. Yet so long as the government is to be the distributor of public educational benefits, a certain degree of involvement between the two is unavoidable if we are to have a just distribution of those benefits. The accreditation of non-public schools and the certification of their teachers necessitates some Church-State involvement. If this degree of involvement is not proscribed, why is it then objectionable to have programs which permit non-public school parents and children to share in public educational benefits? Government surveillance of aid programs is unnecessary since the accreditation process ensures that the non-public schools are providing a satisfactory curriculum of secular instruction. It is not the government's nor any taxpayer's concern that some parents choose to use their share of the educational benefits in schools which inculcate religious principles in addition to secular instruction.

To state the "political divisiveness" argument is to ridicule it. If avoidance of strife is a legitimate constitutional end, then why enact any civil rights measures? Racial unrest is a far greater source of political strife than the non-public school issue. Would anyone seriously argue that minority grievances should be quietly ignored because any attempt to remedy them inevitably displeases certain groups? While it is conceivable that a legislative body might out of expediency take this ap-

proach to a constitutional issue, the acceptance of this proposition by the Supreme Court is alarming. Non-public school parents and their children have vital First Amendment rights at stake in this case, and to sacrifice those rights merely to avoid possible political strife is indefensible.

III. The Religion Clauses of the First Amendment Require Governmental Neutrality Toward Religion to Insure Absolute Freedom of Choice in Matters of Belief.

In *Engel v. Vitale*, 370 U.S. 421 (1962) (school-prayer), and *Abington School District v. Schempp*, 374 U.S. 203 (1963) (bible reading), the Court was faced with cases involving conflict between the two Religion Clauses. In an attempt to reconcile the two, the Court evolved the principle of governmental neutrality toward religion. Government must neither aid religion, nor be hostile toward it. It is our contention that the denial of public education benefits to those who choose religiously-oriented non-public schools amounts to hostility toward religion.

On the non-public school issue, the Court has consistently analyzed the cases only in terms of the Establishment Clause. In *Sherbert v. Verner*, *supra*, Justice Stewart in a concurring opinion expressed his concern that an overly-rigid application of the negative values in the religion clauses could produce results inimical to the positive value of true freedom of choice of religious belief. He felt that a "mechanistic concept of the Establishment Clause, is historically unsound and constitutionally wrong" and would lead to "many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause. . . . I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of

hospitality and accommodation to individual belief or disbelief." 374 U.S. 414-415.

It is particularly important that the government remain neutral in regard to choice of schools. Justice Brennan in a concurring opinion in the *Schempp* case specifically mentioned the duty of the government to refrain from influencing the choice between public and non-public schools:

"Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment, the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish or by jeopardizing the freedom of the public schools for private or sectarian pressures. The choice between these very different forms of education is one very much like the choice of whether or not to worship, which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election." 374 U.S. at 242.

Other than imposing outright criminal sanctions, the government could not more effectively inhibit free choice than is done now by forcing parents to choose between free public schools and non-public schools. The attractiveness is diminished only to the extent of thousands of dollars of tuition which most families do not have even if they were willing to undergo the expense.

CONCLUSION

The Title I program is permissible under the First Amendment and thus the decision of the Court of Appeals should be sustained.

Respectfully submitted

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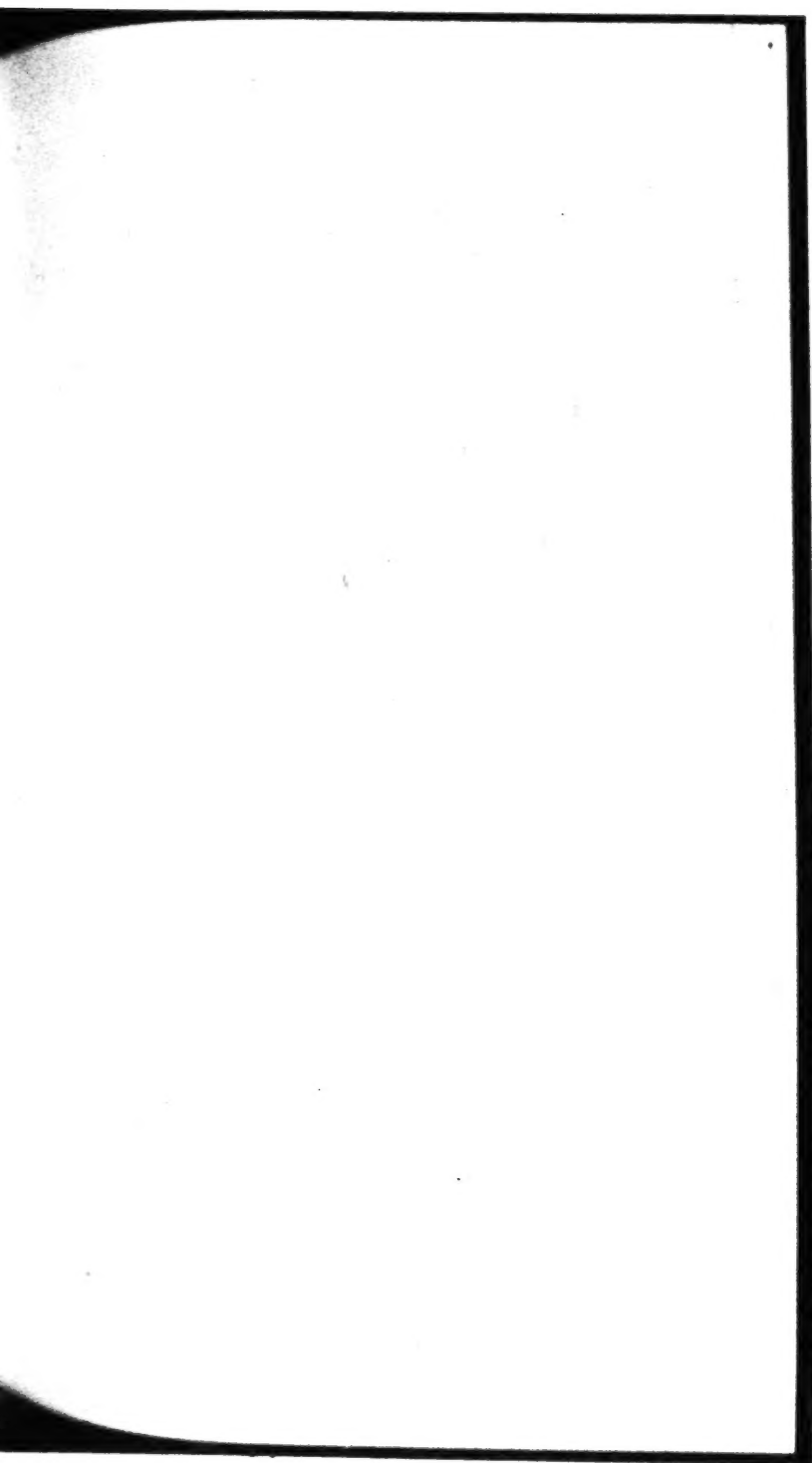


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-62.

HUBERT WHEELER, ET AL.,

Petitioners,

v.

ANNA BARRERA, ET AL.,

Respondents.

**BRIEF OF CATHOLIC LEAGUE FOR RELIGIOUS AND
CIVIL RIGHTS, CITIZENS FOR EDUCATIONAL
FREEDOM, NATIONAL UNION FOR CHRISTIAN
SCHOOLS, AND TORAH UMESORAH-NATIONAL
SOCIETY FOR HEBREW DAY SCHOOLS,
AMICI CURIAE.**

INTRODUCTORY STATEMENT.

The relevant facts, the statutory provisions involved and the opinion of the court below are sufficiently set out in the submissions of the Petitioners and the Respondents. The *amici curiae* have received written consents from the parties to the filing of this brief.

INTERESTS OF THE AMICI CURIAE.

The Catholic League For Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to promote good will and harmonious relations in the community and to combat all forms of religious prejudice and discrimination. The League was founded in 1973 in long overdue recognition that, of all the forms of religious bigotry which have stained American history, anti-Catholic bigotry has been the most persistent and pervasive. The League is in part concerned over law-related manifestations of bigotry and is alarmed, in particular, over efforts today being made to suppress the exercise of First Amendment liberties by supporters of religious schools upon the pretext that such exercise is "divisive".

Citizens for Educational Freedom (CEF) is a nonprofit nonsectarian organization with nationwide membership and branches in a majority of states. Founded in 1959, CEF is especially dedicated to protecting the rights of parents in the educating of their children. CEF desires to see excellence, equality and freedom in education for every American child, regardless of race or creed. CEF is also responsive to the now widespread alarm felt by people of all religious faiths over the growth of a legally enforced secularist educational monopoly in American education.

The National Union of Christian Schools is a union of parent-controlled Calvinistic Christian schools in the United States and Canada. At present there are 300 member school units. These parent-owned and parent-operated educational institutions embrace 64,000 pupils and 28,000 teachers. They are operated on the principle that parents have the primary responsibility for the education of their children.

Torah Umesorah-National Society for Hebrew Day Schools is the national agency of all the Hebrew day schools in the United States which offer a combined program of

Hebrew and general studies. Established in 1944, Torah Umesorah is currently composed of some 413 schools in 34 states in 170 communities. These schools have an enrollment of 81,000 students. Torah Umesorah also serves as an umbrella agency for a number of professional organizations such as school principals, PTA groups and teachers' associations. The Society is governed by a board of directors who are elected annually and by an administrative board of seminary deans.

QUESTIONS PRESENTED.

The contention of the Petitioners that the Act does not require the rendering of services during regular school hours by publicly employed personnel was decisively answered by the court below. It can be said, in sum, that the Court of Appeals' understanding of the question represents the national understanding of the question. The Congressional history, the general practice of the federal government and the states for almost a decade, and a vast literature on ESEA provide unanswerable testimony that the Act is intended to benefit educationally deprived children in all—not just some—private schools coming within the terms of Title I.

The Petitioners are therefore left to the contention that this Court must, in effect, rewrite the Act so that its effect upon parochial school children could be summarized as follows:

While ESEA was enacted "in recognition of the special educational needs of children of low-income families" (whether in public or private schools), those children who attend religiously affiliated private schools must, solely because of that fact, be cut off from the benefits of the Act.

The Congress included parochial school children; the Plaintiffs urge this Court to exclude them. They urge that such reading of the Act is required by the Establishment Clause of the First Amendment. Such a reading of the Act would at once result in *other* constitutional issues, which are:

1. Whether the exclusion of children from the benefits of the Act, solely on account of the exercise of religious conscience by them and by their parents, would constitute denial to such children and their parents of their rights under the Free Exercise Clause of the First Amendment.

2. Whether such exclusion, which results in loss of education to such children and loss of financial benefits to their parents, would deny both children and parents due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.
3. Whether such exclusion would constitute unreasonable and arbitrary discrimination against such children and parents, in the exercise of their fundamental liberties, contrary to the requirements of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

1. **The Exclusion of Children From the Benefits of the Act, Solely on Account of the Exercise of Religious Conscience by Them and by Their Parents, Would Constitute a Denial to Such Children of Their Rights Under the Free Exercise Clause of the First Amendment.**

The Supreme Court has long recognized that the Establishment Clause, though cast in absolute terms, may, if carried to a logical extreme, conflict with other constitutional protections. *Everson v. Board of Education*, 330 U. S. 1, 18 (1947); *Zorach v. Clauson*, 343 U. S. 300, 314 (1952); *Board of Education v. Allen*, 392 U. S. 236, 242-243 (1968); *Walz v. Tax Commission*, 397 U. S. 664, 665-669 (1970); *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971). Plainly, Establishment claims may encounter tension with, and find limitation in, Free Exercise claims.

ESEA is truly *public* welfare legislation, not special legislation. It is designed to serve all the members of a public class, not just a part (albeit a majority) of persons in that class. It was enacted in the very teeth of two of the worst challenges which American society faces—lack of education and poverty. The two, as the Congress noted, are profoundly interrelated. Neither Providence nor that society has decreed that children in parochial schools are exempted from poverty or devoid of the need for educational opportunity. The Congress, in justice and with good sense, noted that the educational needs of children in poverty areas are as *general* as poverty itself. And so the legislative relief was designed by the Congress to be general—that is to say, *public* welfare legislation.

This Court, in *Everson v. Board of Education*, 330 U. S. 1, 16 has said that government

“ . . . cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation.”

This Court can and must take judicial notice of the fact that most parents who send their children to religiously affiliated schools do so for *religious* reasons—“because of their faith”. The decision so to enroll the child, and the act carrying out that decision, are acts of conscience and of will based upon religious interest and desire. If, as the Petitioners urge, the Court should rule that, solely “because of their faith”, the children in question must be denied the benefits of the legislation, the children (and their parents) would certainly be burdened in the exercise of their religion. Can it be doubted that, where the Congress has determined that *all* in the class of beneficiaries need help, if such help were then given to all in the class *except* those who had made the religious choice, those who had made that choice would be officially discouraged from making it? Where the class of beneficiaries consists of children of *low-income families*, the deterrent effect is patent. Put in other terms, there would be an effect, indeed hydraulic, pulling people to give up the religious schools which they choose in conscience, in favor of nonreligious schools which, in good conscience, they reject.

No aspect of the Petitioners' claim herein more strongly calls for reconsideration than the fact that, if granted, it would point directly towards forcing all American children, save the very well to do, into public education. Public education is not, however, acceptable to great numbers of Catholic, Jewish and Protestant parents, and education for their children in a religious school is a matter of

strict conscientious obligation to them. *Millions of religiously committed American parents are not going to see their children subjected to schooling in which prayer is silenced, in which the Ten Commandments as the Word of God may not be taught, in which religious values are relativized, and in which—backed by the power and prestige of the state—secular humanist, pagan and agnostic values are made to permeate the daily life of the classroom.*¹

The crude answer, "Then let them pay for such schools", is no answer at all in terms of (a) the needs of today's children in education, (b) inflation, unemployment, economic uncertainty and educational costs, and (c) the demands of the religious conscience of parents. That answer confronts the religious conscience today with the same slapping effect as "Let them eat cake" did the poor of the *ancien régime*. As the Chief Justice stated in his dissenting opinion in *Sloan v. Lemon*, — U. S. —, 37 L. Ed. 2d 948, 981 (1973):

"However sincere our collective protestations of the debt owed by the public generally to the parochial school system, the wholesome diversity they engender will not survive on expressions of good will."

It would indeed be foolish, in today's economy, to suggest that such denial of benefits to low income parents and children would not be called a burden in the sense that the term "burden" has been used in Free Exercise cases.

In the leading case of *Sherbert v. Verner*, 374 U. S. 398 (1963) a Seventh Day Adventist was refused participation

1. The splendid recent plea of Mr. Justice Powell before the American Bar Association for the return of "decency" and "respect for law" in American society triggers directly the disturbing question of how far civility, decency, non-violence and morality are going to be realized in a society in which virtually all children will be forced to spend their school time in schools where traditional precepts of God-centered morality may not be taught.

in public benefits with others in the class of the unemployed solely on the ground of her having made an act of her religious conscience by refusing to work on the Sabbath day of her faith. This exclusion from benefits was held a denial of her free exercise of religion. The Supreme Court stated that burdens on free exercise may be justified only in the name of "a compelling state interest". *Id.* at 403.

No "compelling state interest", requiring the restriction of ESEA benefits as called for by Petitioners, is discoverable. It is not to be found in asserting the Establishment Clause. Nothing is found in the decisions of this Court which suggests that, where there exist competing Free Exercise and Establishment claims, the former are to be suppressed in favor of the latter. The Establishment Clause has never been held to embrace a "preferred freedom" (*cf.*, *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1942)), nor indeed any freedom whatever. But freedom of religion, as embraced by the Free Exercise Clause, has long been held to be a most precious, exceptionally protectable freedom. *Ibid.* And as this Court has said:

" . . . the Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto. . . ." *School District of Abington Township v. Schempp*, 374 U. S. 203, 222 (1963). (Emphasis supplied.)

It cannot be denied that, if children of low income families, otherwise eligible for services under ESEA, are barred from these on absolutely equal terms with other eligible children, the former (and relatedly their parents) are seriously impeded in enjoyment of "the right to choose their own course" as dictated by religious conscience.

2. **The Exclusion of Children From the Benefits of the Act, Which Results in Loss of Education to Such Children and Loss of Financial Benefits to Parents, Would Deny Both Children and Parents Due Process of Law Contrary to the Provisions of the Fifth Amendment to the Constitution of the United States.**

The opinion of the Court of Appeals amply shows the deprivation of tangible educational benefits to children and related financial loss to parents which would result from a declaration by this Court that, solely because of obeying conscience by the pursuing of a religious education, a child must be rendered ineligible to receive a public welfare benefit for which he would otherwise be eligible.

The deprivation which has been so zealously pursued by the Petitioners on paper-thin pretexts pertaining to statutory interpretation, state law, and administrative efficiency can certainly not be confirmed by this Court on the ground that the Establishment Clause requires it. That would render the Establishment Clause not only as a suppressant of the free exercise of religion but as an engine for denying people benefits to which, as citizens, they have a natural right. The *amici curiae* submit that it would be no answer to assert that the judgment, on Establishment Clause grounds, sought by the Petitioners would, in legal fact, constitute due process. The familiar elements of substantive due process deprivation would be strikingly apparent: (a) an actual deprivation (b) of something of value (c) arbitrarily, or irrationally.

On the question of the arbitrary or irrational character of such a deprivation, perhaps it is sufficient to say that nothing but the despicable in American constitutional history would justify it. It is absurdity itself to imagine that anything whatever, in the will or thinking of the Founding Fathers so much as suggests that children of low-income families in today's society should be legally

yellow-badged out of common educational benefits because of following religious conscience. It defames Madison, Jefferson and the other authors of our Constitution to ascribe to them so thoroughly evil a disposition of mind. Jefferson, one may more sensibly presume, would be horrified at the exclusion, and all of the Founders would decry using the Establishment Clause as a bludgeon for dragging children into a secularist and monolithic public school system.

We have spoken here of "the despicable in American constitutional history", and it is indeed to that tradition that the Petitioners appeal. They would have the Establishment Clause interpreted according to the unhallowed concept of church-state separation which was the core of the Nativist movement,² the rallying cry of the American Protective Association,³ and the objective of like groups which, from 1855 forward (and notably not earlier) rewrote the state constitutions to debar children in religious schools from receiving any public aid.⁴ Its thinking was well expressed to this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). There the defenders of an Oregon statute which would require all children to attend public schools pleaded:

"Our nation supports the public school for the sole purpose of preservation.

. . .

"Mix those [children] with prejudices in the public school melting pot for a few years while their minds

2. See, G. Myers, *HISTORY OF BIGOTRY IN THE UNITED STATES*, 140-295 (1943).

3. See, D. Kinzer, *THE AMERICAN PROTECTIVE ASSOCIATION*, 95-212 (1964).

4. See, III Debates in the Massachusetts Convention, 614-626 (1853); Bridgman, *THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917*, iv (1923); J. Pratt, *RELIGION, POLITICS AND DIVERSITY*, 158-203 (1967).

are plastic, and finally bring out the finished produce—a true American.” OREGON SCHOOL CASES COMPLETE RECORD, 732 (1925).

This Court rejected that view, stating:

“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to *standardize* its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*” *Id.* at 534. (Emphasis supplied.)

If the Petitioners now were to succeed in their contention that the Establishment Clause bars ESEA benefits to children in religious schools, they would have gone far in achieving the result which this Court rejected in *Pierce*. Highly vocal proponents of that contention are not lacking on the American scene. Professors Freund and Ulich urge precisely that role for the public school which the defenders of the Oregon statute urged:

“. . . to educate free minds who, on the one hand, appreciate the depth of man’s religious tradition, but to whom, on the other hand, *the old denominational and dualistic conflicts appear secondary*, if not inhibitive to, a unifying world outlook.” P. Freund, and R. Ulich, RELIGION AND THE PUBLIC SCHOOLS, 17 (1965). (Emphasis supplied.)

This view envisions the public school as a *supplanter* of the religious school, the implication being that the public school will supply unifying values which would otherwise be lacking in our society owing to the existence of sects. This assertion goes well beyond mere social unifying and plainly relates to philosophy and religious doctrine. The amici

curiae believe it most relevant to their position in this brief, to express their concern over an establishment of a religion of cultural unity, freely inculcating in children principles of conduct and world outlook while barring the slightest affirmation of the existence of God, the soul, the Commandments, sin, or future reward and punishment. If public education conceives that it is charged with providing a child with a working philosophy of life, if it feels it must address itself to those ultimate questions of the child which were always deemed religious, it then, in fact, teaches and sponsors religion. The task assumed by Freund and Ulich for public education—namely, to raise the mind of the child above the warrings of the demoninations and bring him to a “unifying world outlook”—presupposes a judgment upon the contentions of the “denominations” (which, to these, are contentions for religious *truths*), a judge capable of making the judgment (that is, of arriving at a truth for which he will contend) and then of pronouncing his truth, or a world view, in substitution of older *religious* claims. This in itself is to state a religious claim.

Thus the deprivation which Petitioners here pursue, finding its supposed justification in the Establishment Clause will perforce result in Establishment Clause problems, since it will have the necessary effect of pushing more religious school children into public school, with the great danger that the public school will promote a secularist substitutional religion.

3. The Exclusion Would Constitute an Unreasonable and Arbitrary Discrimination Against Such Children and Parents, in the Exercise of Their Fundamental Liberties, Contrary to the Requirements of the Fifth Amendment to the Constitution of the United States.

This Court in *Bolling v. Sharpe*, 347 U. S. 497 (1954), held that the Fifth Amendment bars racial discrimination

by agencies of the federal government. Certainly, the Establishment Clause must be read in relationship to the limitations of the requirement of equality before the law. As has been seen, this Court has stated that government "cannot *exclude*" individuals, "because of their faith or lack of it" from receiving the benefits of "public welfare legislation". Petitioners here seek to exclude the child Respondents from a general program of public welfare benefits solely "because of their faith" (since only "because of their faith" do they pursue education in state-qualified religious schools).

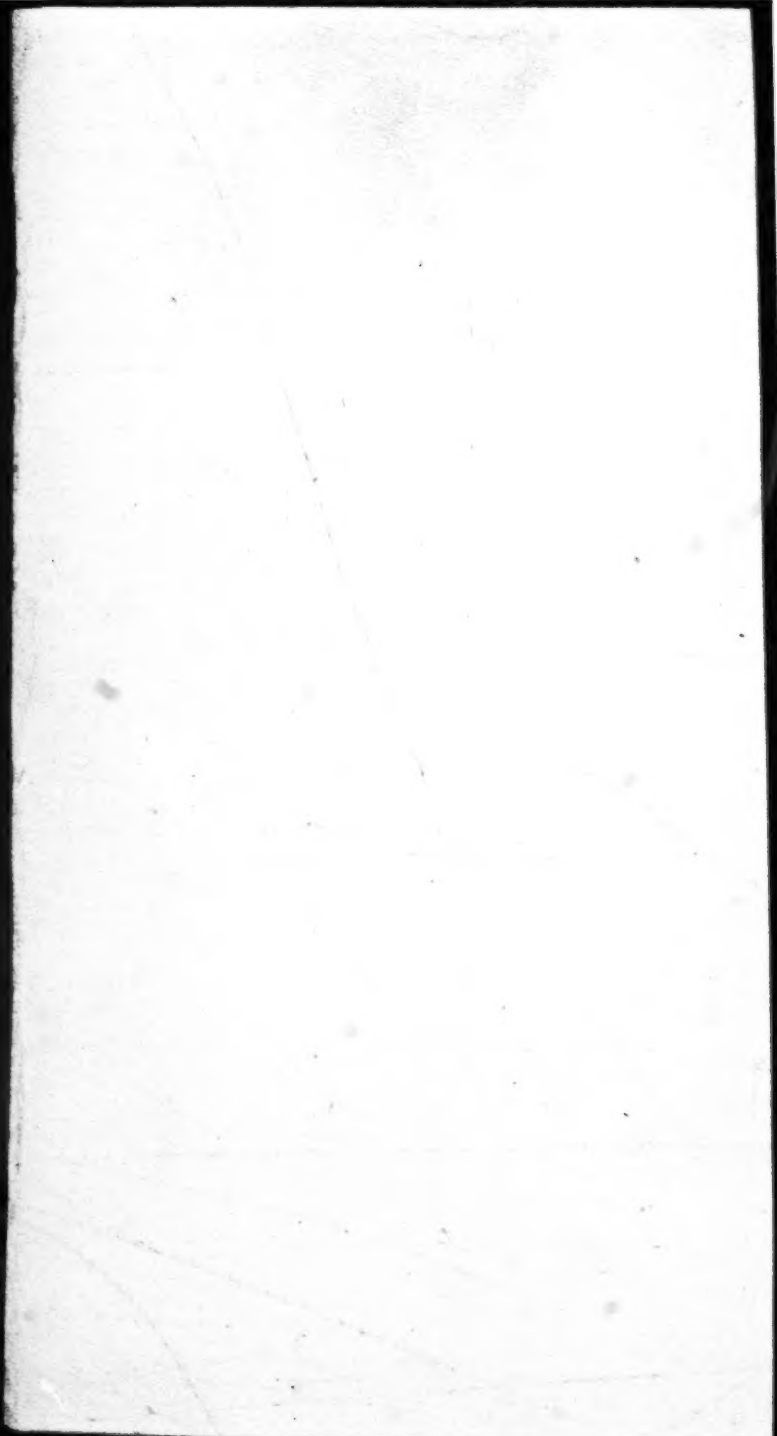
But as race and alienage may not be employed as standards for discrimination, neither may religion. *Oyler v. Boles*, 368 U. S. 448, 456 (1968). *To hold that an individual must be cut off from welfare benefits aimed at a class to which he plainly belongs, on the ground that these benefits may, to some extent, serve to accommodate his preference for a religious education for his child, is as much an offense to the principles of Equal Protection and of government neutrality towards religion as it is a gross caricature of the principle of Nonestablishment.*

CONCLUSION.

In view of the foregoing, it is submitted that the Court of Appeals was correct in its judgment and that that judgment should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1975

No. 73-63

HUBERT WHEELER, et al.,

Petitioners,

v.

ANNA BARRERA, et al.,

Respondents.

ON PETITION FOR A WRIT OF HABEAS CORPUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF UNITED STATES
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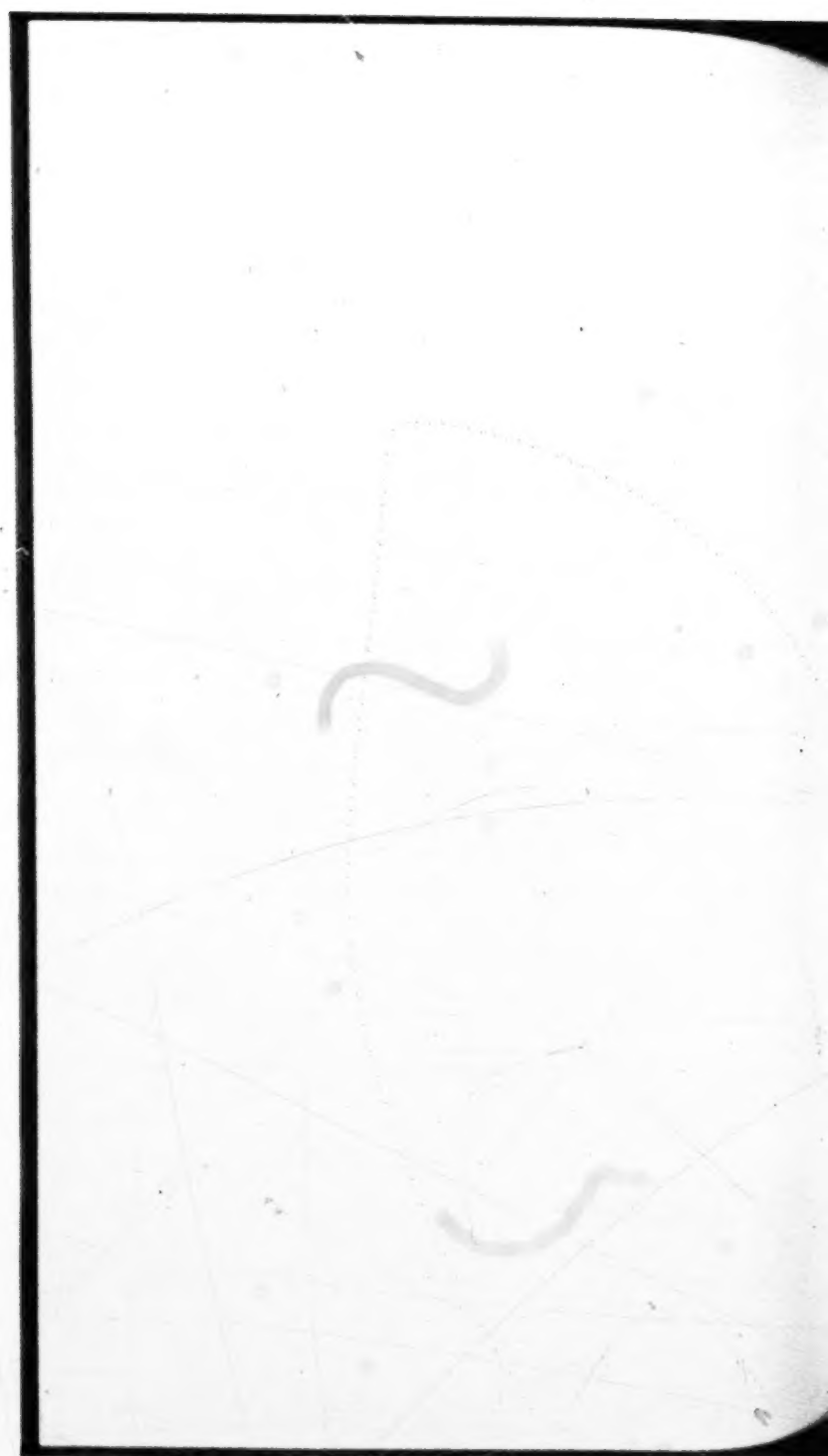
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, *et al.*,

Petitioners,

v.

ANNA BARRERA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF UNITED STATES
CATHOLIC CONFERENCE, AMICUS CURIAE

INTRODUCTORY STATEMENT

The applicable constitutional and statutory provisions, the regulations involved and the opinions of the courts below are sufficiently set out in the briefs filed by the petitioners and respondents. The facts of record in this case are also stated in the briefs filed by the opposing parties and this *amicus* accepts them for the purposes of

its own brief.¹ Petitioners and respondents have consented in writing to the filing of this brief by the United States Catholic Conference, Incorporated.² These have been filed with the Clerk.

IDENTIFICATION AND INTEREST OF THIS AMICUS

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications, and public affairs.

Of special relevance in light of the issues presented in this case, is that the membership of the Roman Catholic Church in America has organized, and continues to operate, a substantial system of private nonprofit schools at the elementary and secondary levels in the United States. In 1972-1973, there were 10,534 such schools, enrolling 3,789,723 students. These schools have been most commonly located in urban areas in the past and

¹ There appears to be some disagreement between petitioners and respondents with respect to certain alleged facts. (Respondents' Brief, pp. 24-25.) To the extent that any of these disputed facts are material to the issues before the Court, the record and the pertinent regulations would appear to support the respondents' understanding of them.

² Hereinafter usually referred to as "USCC."

this remains largely true today. Almost 50% of all Catholic schools are located in urban and inner city areas. Nearly 1,000,000 students are enrolled in Catholic schools in inner city areas where heavy concentrations of the educationally disadvantaged children are found. In the Nation's twenty largest cities, nearly two of five school children are enrolled in nonpublic schools, of whom about 80% are in Catholic schools. In some rural pockets of poverty, Catholic schools are the only ones available. Racial and ethnic groups include the American Negro, American Indian, Oriental American, and the Spanish surnamed.

Catholic leaders have expressed a commitment to continue and endeavor to expand the services to non-public school students in the poverty areas served by these schools. The American Catholic Bishops said recently:

"Education is a basic need in our society, yet the schooling available to the poor is pitifully inadequate. We cannot break the vicious cycle of poverty producing poverty unless we achieve a breakthrough in our educational system. Quality education for the poor, and especially for minorities who are traditionally victims of discrimination, is a moral imperative if we are to give millions a realistic chance to achieve basic human dignity. Catholic school systems, at all levels, must redouble their efforts, in the face of changing social patterns and despite their own multiple problems, to meet the current social crisis."³

³Statement of the National Conference of Catholic Bishops on *National Race Crisis*, April 25, 1968, pp. 4-5.

It is the concern of USCC that these services to our Nation's educationally deprived children be expanded and strengthened in the name of humanity. Services and equipment provided under public auspices by the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e)⁴ greatly improve the educational opportunities of these children. It is the national purpose to break the vicious circle of poverty produced by poverty by the education of the disadvantaged so as to permit them to live meaningful and productive lives. This supreme objective would be adversely affected should this federal assistance be forbidden to the more than 1,000,000 educationally deprived children attending nonpublic, church related schools.

QUESTIONS PRESENTED

In their statement of the questions presented, petitioners tender a question not presented by the record in this case. Specifically, they ask that the Court decide whether the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e(a)(2)) "require[s]"⁵ that the same special instructional services made available to educationally deprived children in public schools during regular school hours also be made available to educationally deprived children in nonpublic, church related schools during regular school hours. Whether ESEA "requires" the performance of special instructional

⁴ Hereinafter usually referred to as "ESEA."

⁵ Petitioners' Brief, p. 5.

services by publicly employed personnel on nonpublic school premises during regular school hours for the assistance of educationally deprived children attending nonpublic, church related schools is not a question which can fairly be drawn from the facts out of which the instant case emerges. Accordingly, this *amicus* has reframed the statutory construction issue.⁶ That issue, as restated, and the other questions presented, in the view of this *amicus* are:

1. Whether, given the statutory authorization in 20 U.S.C. 241e(a)(2) for special educational services for educationally deprived children in nonpublic schools, and given the special situation in Missouri where dual enrollment is forbidden by state law, the Eighth Circuit erred in holding that if special remedial instructional services funded under ESEA for educationally deprived children are performed by publicly employed personnel in the public schools during regular school hours, educationally deprived children attending nonpublic, church related schools are entitled to, and the public educational authorities must provide, a program of special services of a quality, scope, and opportunity for participation *comparable* to the special services afforded the educationally deprived children attending public schools?

2. Whether, on the factual record of this case, the Court of Appeals abused its judicial discretion in holding

⁶Although restated, the question is one which is "fairly comprised" within the petitioners' statement of the questions presented. Rule 40-1(d)(1) of the Supreme Court Rules.

that petitioners' claim that the Establishment Clause of the First Amendment prohibits the performance by publicly employed personnel of special remedial services for educationally deprived children on the premises of nonpublic, church related schools during the regular school day is not ripe for adjudication at this time?

3. Whether the Establishment Clause of the First Amendment is violated by the employment of public personnel to perform special instructional services, including remedial reading and remedial arithmetic, to assist educationally deprived nonpublic school children on the premises of nonpublic, church related schools during the course of regular school hours?

SUMMARY OF ARGUMENT

I.

A. The legislative history of ESEA demonstrates that it was Congress' clear intention that the educationally deprived children of America were to be afforded the benefits conferred by ESEA without discrimination based on their school attendance. Thus, Congress intended that educationally deprived children attending nonpublic schools, including church related schools, be afforded special remedial instructional services comparable to those provided by the local educational authorities to children attending public schools.

B. Congress' original intention that educationally deprived children attending nonpublic schools were to receive comparable benefits under the Act is confirmed by the post enactment history of the statute. Thus, from the beginning, the regulations promulgated by the United States Office of Education to implement ESEA have required that educationally deprived children attending

nonpublic schools must be provided genuine opportunities to share in the benefits which the statute provides. It is also clear from the annual reports of the National Advisory Council on Education for Deprived Children to the President and the Congress that this statutorily created Congressional watchdog also accepted the view that Title I of ESEA was designed to aid all educationally disadvantaged children and to provide special services to educationally deprived nonpublic school children on a comparable and nondiscriminatory basis.

C. Since its original enactment in 1965, ESEA has been amended by Congress without any change in the original statutory language providing for assistance to educationally deprived children attending nonpublic schools. In subsequently amending the law, Congress acted with full knowledge that both the Office of Education and the NACEDC had interpreted 20 U.S.C. e(2)(a) to require that the special services programs authorized by the statute are to be extended to educationally deprived children attending nonpublic schools.

D. The attorneys general of a large number of states, including Missouri, have taken the position that, since ESEA is financed by federal funds, considerations of state constitutional and statutory law are not relevant. In determining that the ESEA benefits may be extended to children attending nonpublic, church related schools without regard to state law, the conclusions of the state attorneys general are in accord with the fiscal policy of the federal government which does not permit the co-mingling of ESEA funds with state funds.

E. By a state court interpretation of its compulsory attendance law, Missouri has outlawed the dual enrollment of public and nonpublic school children during

regular school hours. At the same time, Missouri is providing special remedial instruction services in the public schools for its educationally deprived public school children. Under the unique situation which exists in Missouri, therefore, it is legislatively required in order to achieve comparability of treatment, and constitutionally appropriate, to provide special remedial educational services to educationally deprived children in nonpublic, church related schools.

F. Language similar to that of 20 U.S.C. 241e(a)(2) has been used in a number of federal statutes subsequently enacted to provide assistance, including remedial instructional services, to handicapped children, children of limited English speaking ability, and minority isolated children attending nonpublic schools. These statutes express a purpose which now has become basic Congressional policy. That is, the educationally deprived child, the handicapped child, the child of limited English speaking ability, and the minority isolated child are to be treated comparably and equitably, whatever the schools they may attend.

II.

In exercising their judicial discretion by refusing to pass upon the Establishment Clause issue advanced by the petitioners, the Court of Appeals for the Eighth Circuit was adhering to the holdings of this Court which caution that constitutional adjudication is to be avoided where the record is inadequate to permit the informed and responsible adjudication which an important constitutional issue always merits. *Powell v. Texas*, 392 U.S. 514, 521 (1968). That precautionary precept has been followed in the State-Church field of constitutional law. *Board of Education v. Allen*, 392 U.S. 236, 248 (1968).

Despite the plaintiffs' heavy but irrelevant reliance on a law review article, and their attempt to stretch the doctrine of judicial notice to unprecedented lengths, the fact is that at the present time there is no program of special remedial instructional services provided for nonpublic school children which is now in operation in Missouri. Thus, the important constitutional issue which the petitioners attempt to raise in this Court is unaccompanied by facts sufficient to serve as a predicate for its resolution.

III.

If, however, this Court should deem it appropriate to answer the question of the constitutionality of the special remedial instructional services on nonpublic school premises that the Court of Appeals approved in accordance with the provisions of Title I of ESEA, this *amicus* submits that the only appropriate answer is an affirmative one.

A. The net result of the "school aid" cases decided so far by this Court is that some forms of public assistance to the secular education of children attending church related schools are constitutional and some are not. Four kinds of assistance have been specifically declared constitutional: buses, books, lunches and health services provided in common to all students. *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971). Seven kinds of assistance have been declared unconstitutional. *Lemon v. Kurtzman*, *supra*, *Levitt v. Committee*, 413 U.S. 472 (1973), *Committee v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973).

The seven types of assistance declared unconstitutional by this Court shared one common characteristic: they were given only to nonpublic schools or their teachers or

the parents of the children attending them. The four types of assistance established as constitutional by the decisions of this Court share exactly the opposite characteristic: they are provided to all schools or all students, both public and nonpublic. Title I of ESEA and the special remedial instructional services approved thereunder by the Court of Appeals for the Eighth Circuit in this case provide benefits for *all* educationally deprived children, both public and nonpublic.

B. The mere fact, however, that a program is general, covering both public and nonpublic school students, is not sufficient to guarantee constitutionality. *Norwood v. Harrison*, 413 U.S. 455 (1973). The decisions of this Court make it clear that for nonpublic school students to participate in publicly provided educational services, the services must not only be provided to all students but they must also be "secular, neutral and nonideological." is only in this way that the participation of church related school students can pass the purpose-effect-entanglement test of the No Establishment Clause.

Application of this three-pronged test to the remedial instructional services involved in this case shows that the participation of church related school students does not offend the Establishment Clause. The secularity of the Congressional purpose in enacting Title I of ESEA and of including educationally deprived children in church related schools in its programs is both conceded by petitioners and overwhelmingly clear from the legislative history. The secularity of the primary effect of the actual operation of Title I projects is proven by two considerations: (1) educationally deprived children receive remedial instruction, wholly by publicly employed personnel, in reading and arithmetic, subjects that are indispensable to a secular education, and (2) there is no

"direct and substantial advancement of religion". *Committee v. Nyquist*, 413 U.S. 756 (1973), because there is no funding in Title I projects of any of the *basic* or *actually existing* programs of instruction in church related schools.

The third prong of the No Establishment test is "excessive entanglement." Given the factual posture of this case, in which the petitioners have persistently prevented the implementation of *any* remedial instruction programs under Title I of ESEA on *any* church related school premises under *any* circumstances, the Court has been put in an almost hopelessly conjectural position with respect to the application of the entanglement test. Petitioners are arguing, in effect, that the entrance of publicly employed educational personnel on church related school premises is, on its face, "excessive entanglement" of government with religion. This is manifestly false because from *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) to date, this Court has often reiterated the right of the state to regulate and inspect church related schools. Church related schools are not sacred enclaves on which government personnel are forbidden to enter for any and all purposes. The No Establishment Clause does not excommunicate any religious institution from secular public services.

There is no serious potential for excessive entanglement, either administrative or political, in this case. Title I projects do not involve the federal or state governments in surveillance of any of the regular classes in a church related school. They do not necessitate any judgments about what is secular and what is religious in those classes. Title I teachers are all publicly employed personnel. The design, operation and supervision of Title I projects is wholly under public control. The only role

played by church related school personnel is to provide needed assistance to public officials to make certain that the projects will reach all similarly deprived children and to provide a place in the church related school where the project may be conducted.

The danger of excessive political entanglement arises when a particular educational program is divisive because it benefits relatively few religious groups. Title I of ESEA benefits all educationally deprived children, regardless of their religion and of the school they attend. This Court has never held any educational program unconstitutional *solely* because of excessive political entanglement. To do so would involve the Court in a contradiction, because it would mean that it would be unconstitutional to *seek* what it is constitutional to *receive*.

C. Petitioners' contention that the facts of this case are indistinguishable in substance from the facts of *Lemon v. Kurtzman, supra*, and its companion cases is also without merit. We have already indicated many constitutionally decisive distinctions. Title I is general in its coverage of educationally deprived children. Title I remedial instruction projects are wholly under public operation as well as public control. Title I provides no funds whatever for the regular operations of church related schools. Title I creates no potential for excessive administrative entanglement or political devisiveness along religious lines.

D. In conclusion, this *amicus* submits that, in addition to passing the No Establishment Clause test and to being in harmony with the existing precedents of this Court, Title I remedial instruction programs on nonpublic as well as public school premises achieve important positive constitutional values through (1) genuinely assisting genuinely deprived children and (2) accommodating the

governmental role in education to the rights of parents, to the free exercise of religion and to academic freedom and the role of private institutions in American education.

ARGUMENT

I.

BOTH THE LEGISLATIVE AND POST ENACTMENT HISTORY OF ESEA SUPPORT THE CONCLUSION THAT THE ACT WAS INTENDED TO REQUIRE COMPARABLE SPECIAL INSTRUCTIONAL SERVICES FOR EDUCATIONALLY DEPRIVED CHILDREN ATTENDING NONPUBLIC SCHOOLS.

In this section of its brief, USCC shows that both the legislative and post enactment history of the Act demonstrate a firm and undeviating Congressional intention that educationally deprived children who attend nonpublic schools, including church related schools, are to be afforded special services comparable to those provided for educationally deprived children attending public schools. The respondents have discussed the legislative history of the statute in some detail and this *amicus*, therefore, has attempted to avoid repetition of that discussion.

A. The Legislative History of the Act. Although the legislative history of ESEA is not absolutely free of ambiguity, it demonstrates a clear Congressional intention that the educationally deprived children of the Country are to be afforded the benefits conferred by the statute without discrimination based on their school attendance.

The Elementary and Secondary Education Act of 1965 constituted a major national effort to upgrade education

in the United States. Indeed, the goal of the Congress in passing it was to provide "*Full Educational Opportunity*."⁷ President Johnson's Message to Congress on Education of January 12, 1965 on the occasion of the introduction of the education bill stated:

"Every child must be encouraged to get as much education as he has the ability to take. We want this not only for his sake but for the nation's sake."⁸

The intended beneficiaries of this legislation were a special class, namely, educationally disadvantaged children, whoever they might be and wherever they might be found. As President Johnson said:

"Federal action is needed to assist the states and localities in bringing the full benefits of education to children of low income families. *Assistance will be provided, for the benefit of all children within the area served, including those who participate in shared services or other special educational projects.*" (Emphasis added.)⁹

Similar language appears in the President's budget message of January 25, 1965, where he emphasized that federal aid is essential in order to end the situation in which children can be handicapped for life because of lack of adequate educational opportunity.¹⁰

⁷ 21st Annual Congressional Quarterly Almanac 1374 (1965).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Id.* at 1356.

In view of the fact that ESEA represents a major effort, based on a national consensus, to enable the youth of the Nation to realize their educational potential, it would mock the statute's avowed purpose to conclude that the Congress intended to treat children who fall within the same legislative class in a different way because of the school which they might happen to attend. Respondents correctly have contended from the inception of this litigation that educationally deprived children attending nonpublic schools are entitled to assistance comparable to that which is given to children in public schools for they have the same needs and fall within the same class which the legislation was intended to help.

The Reports of the House and Senate Committees also emphasize the proposition that special educational and instructional services are to be extended to all educationally deprived children.¹¹ For example, the House Report on the bill stated:

"Thus, the bill does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary students who are not enrolled in public schools."¹²

The Report of the Senate Committee on Labor and Public Welfare expresses the same broad purpose:

¹¹Respondents' Brief, pp. 65-67.

¹²H.R. Rep. No. 143, 89th Cong. First Sess. 7 (1965).

"... and we will liberate each young mind—in every part of this land—to reach the furthest limits of thought and imagination."¹³

There are other relevant items of the legislative history of the Act which are referred to in the respondents' brief and which point up the intention to provide assistance—significant assistance—to all children, regardless of the school which they attend. Admittedly, Congress did not take the position that any specific type of assistance had to be provided by the local educational agencies. Discretion was given them to adopt the most appropriate program or programs. The Congress did not intend however, that the local educational agencies could abuse their discretion by discriminating between public and nonpublic educationally deprived children on the basis of school attendance. Such discrimination would violate directly the pervading purpose of the legislation. Moreover, such an invidious classification of children similarly situated would be inconsistent with the position taken by this Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), where, speaking through Mr. Justice Black, it stated:

"... on the other hand, the language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their religion. Consequently, it cannot exclude Catholic, Lutherans" ... or the members of any other faith because of their faith or lack of it from receiving the benefits of public welfare legislation."¹⁴

¹³S. Rep. No. 146, 89th Cong., First Sess. 4 (1965).

¹⁴330 U.S. at 16.

B. *The Post-Enactment History of ESEA Manifests Congressional Confirmation of the Statute's Purpose to Provide Comparable Special Services to Educationally Deprived Nonpublic School Children.* From the above review of the legislative history of ESEA and the unmistakable emphasis which it places upon aiding a special class of educationally deprived children, it is obvious that the Executive Branch, which submitted and supported the bill and the Congress which enacted the statute, both intended that *all* educationally deprived children were to receive comparable benefits under the Act. This *amicus* now shows in this section of its brief that this intention is confirmed by: (1) the interpretation afforded the Act by the Commissioner of Education; (2) the construction of the statute adopted, and reported to the Congress, by its statutorily established watchdog, the National Advisory Council on Education of Disadvantaged Children;¹⁵ and (3) the re-enactment by the Congress, without change, but aware of their administrative construction, of the critical legislative provisions mandating aid to nonpublic school children who are educationally deprived.

1. *The Regulations of the Office of Education*

ESEA is a statute which was both novel and broad in vision, conception, purpose and reach. It was the Office of Education, under the jurisdiction of the Department of Health, Education and Welfare, which was entrusted

¹⁵Hereafter usually referred to as the "Council" or the "NACEDC."

with the primary administration of this innovative law. From the beginning, the regulations promulgated by the Office of Education to implement ESEA have required that educationally deprived children attending nonpublic schools must be provided genuine opportunities to share in the benefits offered by the Act.¹⁶ Admittedly, the Commissioner's regulations are not conclusive on the point. They do, however, carry great weight, for this "Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Perkins v. Matthews*, 400 U.S. 379, 381 (1971); *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-627 (1971).

That canon of statutory construction would seem especially applicable here. The Office of Education played a very significant part in the drafting of ESEA, including those provisions which extend its benefits to educationally deprived children attending nonpublic schools. The Office of Education was well aware that these provisions were an integral part of the breadth of vision of ESEA. The views of a governmental agency which assisted in developing a statute are entitled to great weight in its interpretation. *Adams v. United States*, 319 U.S. 312, 315 (1943). And an administrative practice has particular weight when it involves a contemporaneous interpretation of a statute by the officials who were "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Nor-

¹⁶45 C.F.R. 116.19 (1972).

wegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933). Cf. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956). In any choice between the interpretation of the Act's requirements by the Office of Education, so far as they apply to the statutory benefits to be afforded nonpublic school, educationally deprived children, and that argued for by the petitioners, the Office's interpretation should occupy a preferred position.

2. *The Interpretation of the Act and Reports to the Congress by the National Advisory Council on Education of Disadvantaged Children*

Section 212 of the original ESEA provided for the establishment of a National Advisory Council on Education of Disadvantaged Children.¹⁷ Although the Council was not charged with actual enforcement of the Act, it was given important responsibilities with respect to it. The Council's primary function was to review the administration of the legislation and to report annually to the President and the Congress. NACEDC was also given authority to authorize basic research in order to secure relevant data. It is fair to say that since its creation the Council has kept a watching brief over the administration of the Act and carefully reported the results of its surveillance to the Congress annually.

The Council's annual reports refer to various aspects of the administration of the statute and, we believe, constitute an important and contemporaneous source of

¹⁷20 U.S.C. 241(i).

interpretation as to its meaning. The first report of the Council was on March 31, 1966. In it, the Council stated:

*"There are, however, some early indications that the disadvantaged children in private and parochial schools are receiving less help than Title I intended for them. . . . It is the Council's feeling that the program will continue to be effective only as long as it is administered to reach all needy children wherever they are found. (Emphasis added.)"*¹⁸

Additional credence was given to this report of the Council by reference to it in a report of the House Committee on Education and Labor which accompanied the 1966 amendments to ESEA.¹⁹ In its 1969 report, the Council returned to a consideration of the participation of nonpublic school children under Title I. It stated:

*"The concept of using federal funds to attack educational handicaps of disadvantaged children whether in public or private schools has gained increasingly widespread and solid support since Title I first went into operation. Although ESEA has been amended in 1965, 1966, and 1967, the desire of Congress to help disadvantaged nonpublic school children has remained firm." (Emphasis added.)*²⁰

¹⁸Report of the National Advisory Council on Education of Disadvantaged Children (1966), p. 21.

¹⁹H. Supp. Rep. No. 1814, part 2, 89th Cong., 2nd Sess. 3 (1966).

²⁰Report of the National Advisory Council on Education of Disadvantaged Children (1969), p. 27.

The Council's report for 1969 also contained an extensive analysis of the participation of nonpublic school children under Title I and cited the conclusions of special research teams. In its summary of findings and recommendations the Committee stated:

"...most of the cities studied show varying degrees of cooperation involving nonpublic school officials in planning Title I programs; more often than not they offer nonpublic school children participation only in scattered programs at the convenience of public school Title I administrators."²¹

The Council then offered seven basic recommendations in order to improve participation of educationally disadvantaged children enrolled in nonpublic schools.²²

The Report of the Council for 1973 expressed continued concern that in some areas children in nonpublic schools were not receiving comparable special remedial services. It stated:

"The Council has consistently supported the need for financial support to the educational programs of disadvantaged children *wherever they attend school*. Past Council reports have recommended that special arrangements be made to deliver remedial services to Title I eligible children who attend nonpublic schools." (Emphasis added.)²³

²¹*Id.* at 41.

²²*Id.* at 42-43.

²³Report of the National Advisory Council on Education of Disadvantaged Children (1973), p. 35.

Finally, the 1973 Report concludes with a specific reference to the case at bar, stating:

"The NACEDC supports the position of the Office of Education to submit an *amicus curiae* brief in an instance like this. The Court's decision was in favor of Anna Barrera and also that public school teachers can teach on premises of nonpublic schools, if that is the only way comparable services can be provided."²⁴

These few citations to the Reports of NACEDC show that the Council has continually recognized, and has so reported to the Congress, the fact that Title I of ESEA was designed to aid all educationally disadvantaged children and to provide such services on a comparable and nondiscriminatory basis.

3. *Congressional Construction of the Statute Since Its Passage.*

It is a traditional canon of statutory construction that where an act of Congress has received a consistent administrative construction of which the Congress is aware and the statute thereafter is re-enacted without altering the prior administrative interpretation, that interpretation is generally accorded considerable weight and usually regarded as a presumptively correct interpretation of the statute. *United States v. Wyoming*, 331 U.S. 440, 452 (1947). This canon would appear particularly relevant in the case of ESEA. Here, the Congress

²⁴*Id.* at 37.

must not only be presumed to be aware of the interpretation given the statute by the Office of Education but further to be cognizant of the interpretation of the statute, as well as aware of the annual reports furnished it, by its statutory watchdog, NACEDC. With such knowledge of administrative interpretation and practice the actions of Congress following the enactment of ESEA have a special relevance in determining whether the construction which the Court of Appeals placed on Section 241e(a)(2) was correct.

The same Congress that enacted the Elementary and Secondary Education Act amended it in its second session (1966). It also took this occasion specifically to re-emphasize the proposition that nonpublic school students could receive special instructional services either on public school premises or on the premises of the school which they attend. If, however, such students received special instructional services on nonpublic school premises there were certain limitations which did not apply when they went to the premises of a public school. For example, on nonpublic school premises health, transportation and remedial services were permissible, but general teaching services were not. The Report of the House Committee on Education and Labor accompanying the 1966 amendments states:

"There is no basis for confusion as to the remedial services limitations we have placed on programs covering nonpublic school children. It was not then, nor is it now, intended that the limitation should apply to the services available to children enrolled in nonpublic schools who participate in projects on public school premises or to children enrolled in public schools. The limitation to such specialized services as health, therapeutic, and remedial services was, and is, not intended to apply

to services made available to disadvantaged children on public premises."²⁵

In 1966, the Senate Committee on Labor and Public Welfare filed a report accompanying legislation to revise Section 203(a)(1) of the original Act so as to permit grants to the Department of Interior for the benefit of Indian children. In this connection, the report stated that the amendment was being proposed with

"the expectation that such children who may be in attendance at mission schools on the reservations would share, to the same extent and degree, in the educational benefits provided by the Bureau of Indian Affairs Schools as are available to nonpublic school children elsewhere in the area serviced by Title I public schools."²⁶

The same report then states that in order that there may be a better appreciation of the program available to children in nonpublic schools under Title I, it was restating the language contained in Senate Report No. 146, April 6, 1966, pp. 11-12. This language, among other things, states that:

"Thus, the Act does anticipate broadened instructional offerings under public sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools."²⁷

²⁵H. Rep. No. 1814, 89th Cong. 2d Sess. 4 (1966).

²⁶S. Rep. no. 1674, 89th Cong. 2d Sess. 12 (1966).

²⁷*Id.* at 13.

This interpretation should be read in light of the fact that the Congress restated Subsection 205(a)(2) of Title I (now 20 U.S.C. 241e(a)(2)) in the process of providing assistance for handicapped children under Title VI of ESEA (20 U.S.C. 1413(a)(2)). This is more than a perfunctory re-enactment of existing legislation; it is the deliberate use of the same language of Subsection 205(a)(2) of Title I in a new title. The correctness of an interpretation given a statute by the agency charged with its enforcement is buttressed when it appears that Congress with "full knowledge" of that interpretation has made significant additions to the statute without amending it to depart from the agency's view. *Farmers Educational & Co-op Union v. WDAY, Inc.*, 360 U.S. 525, 533 (1959). Thus, the 1966 amendments of ESEA together with the statements in the Committee Reports of the House and Senate accompanying those amendments provide convincing evidence of the intent of Congress and indeed emphasizes its original desire that comparable special services should be extended to children in nonpublic schools by virtue of 20 U.S.C. 241e(a)(2).

4. Construction of the Act by State Authorities Supports the Interpretation It Has Received at the Federal Level.

In the last two decades, especially in civil rights litigation, this Court has consistently reaffirmed that State law may not be interposed to frustrate or deny either constitutional rights or those provided under the auspices of important national legislation. See, e.g., *Brown v. Board of Education*, 349 U.S. 294 (1955). This indispensable tenet of American federalism has been recognized and applied by a large number of states which

have taken the position that, since ESEA is financed by federal funds, considerations of state constitutional and statutory law are not relevant. Illustrative is an opinion issued by the Attorney General of the State of New York on July 15, 1965 in which he held:

"The prohibition contained in the New York Constitution would not be involved if the entire cost of the programs in this state—including administration thereof—is paid out of federal grants without the use of any state or local property or credit or public money at any stage of the program, and if the federal monies are at no time commingled with monies of the state or local subdivision thereof."²⁸

The Attorney General of Kentucky stated the point forcefully in an opinion dated July 21, 1966. He said:

"We are of the opinion that the state and local Boards of Education and the State Department of Education are under Public Law 89-10. Likewise only agencies and instrumentalities designated by the Congress to effectuate the present Act. It might be said that these agencies function as trustees or custodians of the federal funds (and property purchased therewith) made available for these programs by the federal government and that in such capacity they are simply administering and disbursing federal funds to carry out the objectives of the federal legislation. In reaching this conclusion we have necessarily determined that the funds provided here essentially retain their character as

²⁸Op. Att'y. Gen. 36 (N.Y. 1965).

federal funds though placed in the hands of state and local agencies. We think this is implicit in the Act which retains authority in the Commissioner to revoke, withdraw or set-off funds for noncompliance with the Act and with programs approved thereunder."²⁹

Formal opinions along these lines have also been rendered by a number of other States.³⁰

Moreover, despite petitioners' contentions to the contrary, the State of Missouri also has followed this general rule. On January 29, 1970, the Attorney General for the State of Missouri rendered the following opinion:

"It is the opinion of this office that the Elementary and Secondary Education Act of 1965 provides that, under certain circumstances and to the extent necessary, public school personnel, paid with federal funds pursuant to this program, may be made available on the premises of private schools to provide certain special services to eligible children and that *Missouri law would not prevent public school personnel, paid with federal funds, from providing these services on the premises of a private school.*" (Emphasis added.)³¹

²⁹O.A.G. 65-865 (Ky.).

³⁰Nevada, OAG 276, November 5, 1965; Colorado, OAG 65-3883, August 9, 1965; New Jersey, November 29, 1965; Oregon, OAG 61-62, July 29, 1966; Puerto Rico, May 20, 1966; Georgia, July 7, 1965; Arizona, October 4, 1965; Iowa, May 3, 1966; Pennsylvania, May 10, 1967; Wyoming, January 21, 1966.

³¹Op. Att'y. Gen. No. 26-9 (Mo. 1970), cited in the Court of Appeals opinion below, 475 F.2d at 20.

This opinion is buttressed by the fact that the Constitution of the State of Missouri expressly provides, that:

"Money or property may also be received from the United States and be redistributed together with public money of this State for any public purpose designated by the United States."³²

Accordingly, any general statements which appear in scattered references in the floor debate in Congress on this issue which might be read to imply that state law would be controlling, must be examined in light of the consistent interpretation of the chief legal officers of the states who concluded that state constitutional limitations do not limit a federally funded program where there are no matching provisions involved.

This conclusion is strengthened by the fiscal policy of the federal government which does *not* permit the commingling of ESEA funds with state funds. When a state's allotment is determined, an authorization (entitled a letter of credit) is issued to the State Department of Education which permits the state to draw on allotted federal funds. The letter of credit authorizes a maximum amount which can be drawn each month. And the regional Federal Reserve Bank is designated as the depository from which the funds may be drawn. Funds are obtained by the Department upon request in accordance with the letter of credit. The Federal Reserve Bank transfers the requested amount to a bank designated by the state where it is deposited to the credit of

³² Mo. Const., Art. III, Sect. 38(g).

the State Treasurer in a special account for federal funds. Thereafter, the Department of Education issues vouchers to the Secretary of the State for the payment of the claims arising under the state plan.³³

D. *Summary.* Thus, the legislative history of the statute, its post-enactment history and the interpretation afforded it by federal and state authorities are all consistent with the proposition that federally provided funds may be used to offer special instructional services performed by publicly employed personnel on the premises of nonpublic schools, including church related schools. By a state court interpretation of its compulsory school attendance law, Missouri has outlawed the dual enrollment of public and nonpublic school children. At the same time, Missouri has emphasized the desirability of providing special instructional services for its educationally deprived public school children. Under these particular, and indeed unique, circumstances, it is legislatively required and constitutionally appropriate to extend comparable special services to educationally deprived children in nonpublic schools as a similar need for those services exists. Actually, under the unusual situation which now prevails in Missouri it is the only alternative available which would comply with the national purposes of ESEA, *i.e.*, that *all* educationally deprived children be given a genuine opportunity to share in its benefits.

³³Letter of Credit Financing System, Office of Education, Implementing Instructions, pp. 1-4. "The Letter of Credit is, in essence, a transfer of trust between the Federal Government and the recipient agencies." *Id.* at 2.

E. *Related Statutes Also Aid in the Proper Construction of What ESEA was Intended to Achieve.* A final guide to the proper interpretation of ESEA, so far as it extends benefits to educationally deprived children attending nonpublic schools, is provided by reference to several other federal statutes which have used the original language of Section 205(a)(2) of Title I.³⁴ These statutes constitute the basic authority for providing federal assistance to various categories of disadvantaged public and nonpublic school children. For instance, reference has already been made to the fact that the language of Section 205(a)(2) was repeated in Title VI of the Elementary and Secondary Education Act and formed a basis for providing assistance to handicapped children in nonpublic institutions. (*supra*, at 25). Identical language is also employed in Section 705(b)(3) of Title VII of the Elementary and Secondary Education Act which related specifically to bilingual education programs.³⁵ Under this language, public school teachers are authorized to provide instructional services for the special educational needs of children of limited English speaking ability. Again, the same language appears in Section 173(a)(6) of the Co-Operative Vocational Education Act, designed to prepare young people for employment through programs which provide a meaningful work experience combined with formal education.³⁶

³⁴Now 20 U.S.C. 241e(a)(2).

³⁵20 U.S.C. b-3(b) 3(B).

³⁶20 U.S.C. 1413(9)(2).

The latest utilization of the Title I language is reflected in Section 710(a)(12) of the Emergency School Aid Act (ESAA), which is designed to eliminate or prevent minority group isolation and to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools.³⁷ In order to clarify the full meaning of the controlling language taken from Section 205(a)(2) of ESEA, the Congress enumerated specific activities authorized thereunder in Section 707(a) of ESAA. The first activity provided for is

"remedial services, beyond those provided under the regular school program conducted by the local education agency." (Emphasis added.)³⁸

Another clarification of the language first used in Section 205(a)(2) of ESEA is language in the ESAA which requires that the assistance to minority isolated children attending nonpublic schools be "made * * * on an equitable basis."³⁹ Many minority isolated children in the inner city areas of major American cities who attend nonpublic schools, including religious related schools, are currently receiving benefits under ESAA which, except for its emphasis on the minority isolated child, is a statute which may be regarded *in pari materia* with ESEA.

³⁷20 U.S.C. 1609(a)(12).

³⁸20 U.S.C. 1606(a)(1).

³⁹20 U.S.C. 1609(a)(12).

From the statutes to which we have just referred, it is apparent that the original language of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e(a)(2)) was not merely an isolated attempt to provide assistance for disadvantaged children in nonpublic schools. On the contrary, that language expresses a purpose which now has become basic Congressional policy. That is, the educationally deprived child, the handicapped child, the child of limited English speaking ability and the minority isolated child, are to be treated comparably and equitably whatever the school he or she may attend. To construe the statute in the narrow fashion urged by the petitioners would be an unjustified retreat from that policy and would cast a long shadow over these Congressional programs.

II.

PETITIONERS' CLAIM OF UNCONSTITUTIONALITY IS NOT RIPE FOR ADJUDICATION

Plaintiffs assert that assigning publicly employed personnel to perform special remedial instructional services on the premises of nonpublic, church related schools during regular school hours violates the Establishment Clause of the First Amendment.⁴⁰ Genuine doubts exist concerning the plaintiffs' standing to press such a claim, one which they expressly asserted for the first time in the Court of Appeals.⁴¹ Quite apart from these reservations,

⁴⁰Petitioners' Brief, pp. 26-41.

⁴¹Respondents' Brief, pp. 82-88.

however, is the compelling concern that the important constitutional issue which the petitioners press upon the Court for decision is not ripe for review in the factual context of this case. They seek, in effect, "an advance expression of legal judgment upon issues which remain unfocused. . . ." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); see also *Longshoremen's Union v. Boyd*, 347 U.S. 222, 223 (1954). And it was precisely on such grounds that the two member majority of the Court of Appeals refused to pass upon the constitutionality issue belatedly advanced by the petitioners, citing their judicial duty, or at least their judicial discretion, to "refrain from passing upon constitutional questions on an abstract or hypothetical basis."⁴²

Examination of the record in this litigation supports the Court of Appeals' refusal to rule on an important constitutional question prematurely. At the present time, there is *no* program of special remedial instruction services performed on non-public school premises in operation in Missouri. Moreover, "no particular program, curriculum or service is *mandatory* under the Act." 475 F.2d at 1354. Local educational authorities may request ESEA funds for a variety of uses.⁴³ No specific remedial program authorized by Title I of ESEA is under attack in this litigation. Many factors would be relevant in determining whether a particular special services program

⁴²*Barrera v. Wheeler*, 475 F.2d 1338, 1354 (8th Cir., 1973).

⁴³See the remarks of Senator Morse in which he provides an extensive list of Title I activities. 111 Cong. Rec. 7298-7299 (1965).

complied with the requirements of the Act, applicable regulations of the United States Office of Education and the Constitution.⁴⁴ In short, the important constitutional issue which the petitioners ask the Court now to decide is unaccompanied by facts sufficient to serve as a predicate for its resolution.

Petitioners' attempt in two ways to cure the shortage of determinative facts from which the case suffers. Neither, however, is permissible. First they rely very heavily on a law review article⁴⁵ purporting to be "a careful study" of the operations of Title I programs in effect in New Jersey.⁴⁶ The law review article, of course, is not a part of the record. Although a law review article may be an aid to argument, it cannot be used as a substitute for material facts in a law suit. The *opinions* of a legal commentator at or concerning the alleged operations of existing Title I programs in New Jersey cannot be converted for use as alleged *facts* purporting to show how a non-existent Title I program might operate in Missouri.

Secondly, in their effort to have the Court rule, despite the lack of a supporting factual context, that it is unconstitutional for publicly employed personnel to perform special remedial instructional services on the premises of non-public, religiously related schools, petitioners would stretch the doctrine of judicial notice

⁴⁴475 F.2d at 1354.

⁴⁵LaNoue, *Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities*, 22 Rutgers L. Rev. 219 (1968).

⁴⁶Petitioners' Brief, p. 11.

into one of judicial surmise.⁴⁷ For example, can the Court, as petitioners would have it do, take judicial notice that *publicly employed* special services teachers cannot be trusted to avoid the teaching of religion on the premises of a nonpublic school?⁴⁸

The Court, of course, is not required to be "blind" to facts which "all others can see and understand. . . ." *Child Labor Case*, 259 U.S. 20, 37 (1922); *United States v. Rumely*, 345 U.S. 41, 44 (1953). Nevertheless, there are outer boundaries to the reach of judicial notice. *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968); *Black Diamond v. Stewart & Sons*, 336 U.S. 386, 397 (1949). This *amicus* respectfully suggests that these limits would be transgressed should the Court accept petitioners' factually unsupported misassumptions as to how a Title I special remedial services program *might* operate in Missouri *if* such program were in actual operation in that state. Petitioners' misapplication of the doctrine of judicial notice is an additional demonstration that the factual record in the present case "is utterly inadequate to permit the sort of informed and responsible adjudication" which an important constitutional issue always merits. *Powell v. Texas*, 392 U.S. 514, 521 (1968).

Thus, in declining prematurely to pass on the First Amendment issue advanced by the plaintiffs, the Court of Appeals was exercising sound judicial discretion and adhering to the holdings of this Court which maintain that where the factual record provides "too fragile a

⁴⁷See, e.g., Petitioners' Brief, pp. 27, 32-33, 36-37, 39.

⁴⁸*Id.*, at 27.

foundation for indulging in constitutional adjudication", such adjudication is to be avoided or postponed. *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Kimbrough v. United States*, 364 U.S. 661 (1961); *Powell v. Texas*, *supra*.

The precept of judicial self-restraint which cautions that an important constitutional issue should not be resolved on the basis of an inadequate factual record has been observed by the Court in the State-Church field of constitutional law. In *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court, speaking through Mr. Justice White, refused, in the absence of specific evidence and based solely on judicial notice, to conclude that New York's free textbook law resulted in unconstitutional state involvement with religious instruction or otherwise violated the Establishment Clause. In particular, the Court noted that: "No *evidence* has been offered about particular schools, particular courses, particular teachers, or particular books." (Emphasis added)⁴⁹ The case at bar suffers from a similar lack of particular, material evidentiary facts on the basis of which the constitutional issue could be decided.

Finally, this *amicus* believes that the imprudence always risked by the unnecessary and premature decision of a constitutional issue is accentuated in this case when the impact or probable consequences of a decision in favor of unconstitutionality are contemplated. We already have referred to the fact that the passage of ESEA manifested a major national effort to enable the children of America to realize their educational potential.

⁴⁹392 U.S. at 248.

(*Supra*, at 14.) This *amicus* also has mentioned other important statutes enacted for the purpose of assisting educationally deprived children, handicapped children, children of limited English speaking ability, and minority isolated children. (*Supra*, at pp. 30-32) Many of the special services programs initiated under such statutes might be in jeopardy if this Court were to decide the constitutional issue in the manner urged upon it by the petitioners. In the next section of this brief USCC argues that ESEA is constitutional. At this point, however, it maintains only that the enormity of the educational, cultural and social consequences which are inherent in the constitutional issue put forth by the petitioners reinforces the conclusion that the premature resolution of that issue, at this time and on the basis of the factual record in this case, would be a departure from the "best teaching of this Court's experience [which] admonishes" that an important constitutional question should not be "entertain[ed] in advance of strictest necessity." *Parker v. County of Los Angeles* 338 U.S. 327, 333 (1949); *Poe v. Ullman*, *supra* at 503.

III.

PUBLIC PROVISION OF THE SPECIAL REMEDIAL INSTRUCTIONAL SERVICES APPROVED BY THE COURT OF APPEALS IN ACCORDANCE WITH THE PROVISIONS OF TITLE I OF ESEA IS WITHIN THE CONSTITUTIONALLY PERMISSIBLE AREA OF SECULAR, NEUTRAL, NONIDEOLOGICAL SERVICES, FACILITIES AND MATERIALS PROVIDED IN COMMON TO ALL STUDENTS REGARDLESS OF THE SCHOOL THEY ATTEND

The basic contention of this *amicus* is that, given the structure and restrictions of Title I ESEA projects, the

special educational services at issue in this case are clearly within the constitutionally permissible area of "secular, neutral, or nonideological services, facilities, or materials" that are "supplied in common to all students" regardless of the school they attend. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

Four points support this contention:

(1) The controlling decisions of this Court establish that some, but not all, forms of public educational assistance to children attending church related schools are constitutional.

(2) The special educational services at issue in this case are constitutional under the established three-prong test of purpose, effect, and excessive entanglement.

(3) There are decisive constitutional differences between the type of special educational services involved in this case and the types of educational assistance that were held unconstitutional in this Court's "school-aid" decisions of 1971 and 1973.

(4) The special educational services authorized by Title I of ESEA promote important positive constitutional values through (a) the provision of aid for educationally deprived children and (b) the accommodation of parental rights in education, the free exercise of religion, academic freedom and the role of private institutions in American education.

A. *State of the Law*. In the last three years this Court has decided eleven cases involving the First and Fourteenth Amendments and education in church-related elementary and secondary schools.⁵⁰ Of these decisions,

⁵⁰*Lemon v. Kurtzman* (with *Earley v. DiCenso*), 403 U.S. 602 (1971); *Sanders v. Johnson*, 403 U.S. 955 (1971); *Brusca v.*

the *Lemon-DiCenso* cases of 1971 and the *Levitt*, *Nyquist* and *Sloan* decisions of 1973 are of controlling significance for the purposes of this case. These decisions do not, however, stand alone. They are based upon, and must be read in conjunction with, six other leading decisions of the Court: *Pierce*, *Cochran*, *Everson*, *Zorach*, *Allen* and *Walz*⁵¹

The net result of all these cases is that some forms of public assistance to the secular education of children attending church-related elementary and secondary schools are constitutional and some are not. For almost fifty years this Court has wrestled with the constitutional

Missouri State Board of Education, 405 U.S. 1050 (1972); *Essex v. Wolman*, 409 U.S. 808 (1972); *Lemon v. Kurtzman* ("Lemon II"), 411 U.S. 193 (1973); *Norwood v. Harrison*, 413 U.S. 455 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Grit v. Wolman*, 413 U.S. 901 (1973). The Court denied certiorari in the Title I ESEA case of *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921 (1973), and vacated a stay of an injunction previously granted by the Court in a state auxiliary services case, *Marburger v. Public Funds for Public Schools of New Jersey*, 413 U.S. 916 (1973). In addition to these elementary and secondary school cases, the Court decided two cases involving church-related colleges and universities, *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 734 (1973), and dismissed an appeal for want of a substantial federal question in another church-related higher education case, *Durham v. McLeod*, 413 U.S. 902 (1973).

⁵¹*Pierce v. Society of Sisters* (with *Pierce v. Hill Military Academy*), 268 U.S. 510 (1925); *Cochran v. Louisiana State Board*

status of church related schools, the children who attend them, the parents who choose them and the teachers who teach in them. At no time has this Court ever given a flat "Yes" or "No" answer to the "aid to parochial schools" question.

Yet, the Court has been far from indecisive. Firm precedents have been established and workable guidelines have been elaborated. The resulting complexity in the law is simply the unavoidable result of the complexity of the constitutional principles involved in these cases. In the education area, the First Amendment's No Establishment and Free Exercise Clauses are in perpetual tension, the first forbidding aid or hurt to religion and the second prohibiting discrimination on religious grounds. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). But the First Amendment is not the only constitutional provision involved. The Due Process Clause of the Fourteenth Amendment also guarantees the right of parents to select

of Education, 281 U.S. 370 (1930); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970). The Court has dealt with governmental involvement with religion in the public schools, a distinctly separate constitutional issue, on three occasions: *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968). In still a third "religion and education" area, the Court has upheld the right of the Amish to an exemption from compulsory school attendance beyond the grammar school level. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

nonpublic schools for the education of their children. *Pierce v. Society of Sisters* (with *Pierce v. Hill Military Academy*), 268 U.S. 510 (1925). The Spending Clause of Article I, Section 8 authorizes Congress to provide for the "general Welfare" of the United States. *United States v. Butler*, 297 U.S. 1, 65-66 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937). Under their reserved powers the States have the right, within constitutional limits, to regulate and support the secular education of children in all schools, public and nonpublic. *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930); *Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, *supra*.

The result of the complex interplay of these principles on various forms of public assistance to the education of children in church related schools can be summarized as follows:

(1) Government may provide the children in these schools with the same secular, neutral, nonideological services, facilities and materials that the government provides *all* school children regardless of the school they attend. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Established examples: Buses, books, lunches and health services. It is also clear from *Levitt v. Committee*, 413 U.S. 472 (1973), that government may pay for the costs of administering standard, secular, neutrally prepared intelligence and achievement tests to pupils in all schools, public and nonpublic.

(2) Church related schools may participate in the traditional tax exemptions accorded charitable, religious and educational organizations. See *Walz v. Tax Commission*, 397 U.S. 664 (1970).

(3) There is, accordingly, some constitutional "leeway for indirect aid to sectarian schools," because "assistance

properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." *Norwood v. Harrison* 413 U.S. 455, 468 (1973). This "leeway" is one example of the "room for play in the joints" of church-state relationships, productive of a "benevolent neutrality," that this Court emphasized in *Walz v. Tax Commission*, *supra* at 669 (1970).

(4) Government may not, however, provide assistance to the secular education of children in church related schools through programs, whatever their form, that contain the following combination of characteristics: the only schools benefiting from the programs are nonpublic schools, the vast majority of which are church related and specifically Catholic schools; the assistance is either not carefully confined to the secular aspects of education in these schools or cannot be so confined without continuous governmental surveillance of teaching by parochial school teachers in these schools; and, owing to the religious narrowness of the class benefited, there is a serious potential for political divisiveness along religious lines. *Lemon v. Kurtzman*, *supra*; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

In reaching these results in the "school aid" cases, this Court has consistently relied upon a three-pronged test: secularity of purpose, secularity and religious neutrality of the primary effect, and avoidance of excessive entanglement. In the next section of this brief, USCC will show that the remedial instructional services for educationally deprived children that are at issue in this case satisfy the requirements of the triple test and are, therefore, within the constitutionally permissible area of

assistance to the education of children attending church related schools.

B. Application of the Test. Although this test is nowhere mentioned in the text of the Constitution, it has been developed by this Court over a period of years in order to harmonize the complex constitutional principles that cases involving education and religion call into play. This Court has consistently rejected the absolutist "no aid to religion" approach to the No Establishment Clause, under which proof of *any* resulting benefit to any religious institution automatically invalidates federal or state legislation. *Everson v. Board of Education*, *supra*, and *Board of Education v. Allen*, *supra*; see also *Walz v. Tax Commission*, *supra*. It is important to keep the historical genesis of this test in mind, in order not to slip into the precise pitfall the test was designed to avoid. Cases involving education and religion involve more than the No Establishment Clause. They also involve educational, parental, student and government interests of the highest constitutional order.

1. *Purpose*

Petitioners concede the secularity of purpose of the challenged provision of Title I of ESEA.⁵² Given the legislative history of the Act, which we have already set forth, petitioners could not have done otherwise. Moreover, the fact of that Congress and the state legislatures have honestly been pursuing secular objectives in the

⁵²Petitioners' Brief, p. 29.

educational legislation so often challenged before this Court is amply demonstrated by the fact that none of the legislation invalidated in 1971 and 1973 was declared unconstitutional under the "purpose" test.

2. Effect

In three cases decided last June (*Nyquist, Sloan and Levitt, supra*), this Court invalidated educational legislation from New York and Pennsylvania on the ground that the legislation had the constitutionally impermissible effect of a "direct and substantial advancement of religion." See especially *Committee v. Nyquist, supra* n. 39. This effect occurred both because the only schools that would benefit from the legislation in question would be nonpublic schools (most of which were church related and, in particular, Roman Catholic) and because the types of benefits provided (tuition grants to nonpublic school parents generally or to low-income families in particular; tax benefits for nonpublic school parents generally; maintenance payments for health and safety facilities; reimbursements for the costs of *all* examinations) were not sufficiently limited to the secular aspects of education in church-related schools. As this Court saw the matter, the New York and Pennsylvania legislation provided a special windfall for church related elementary and secondary schools, a windfall that was not and could not be limited in practice to secular education.

None of these elements is present in the instant case. The obvious primary effect of Title I of ESEA is substantial assistance to educationally deprived children, regardless of the school they attend. Because of their numbers, public school children receive the bulk of the

benefit. Because of their need, nonpublic school children participate in the benefit on an equitable and comparable basis. The secularity of the benefit is guaranteed by the statutory provisions that only public school agencies may submit proposals, receive funds and operate the programs. Only public school personnel may teach.

Unlike the programs invalidated in *Lemon*, *Nyquist*, *Sloan* and *Levitt*, none of the basic educational costs of a church related elementary and secondary school can be paid for, directly or indirectly, with Title I funds. Moreover, if a church related school has expanded its activities beyond basic education, it still cannot receive Title I funds for its extended activities. Title I funds cannot support or supplement *basic* or *actual* educational costs of any given school. Title I funds can only be used for special education services not already in existence.

Petitioners have contested the "special character" of the teaching services authorized by Title I.⁵³ They seem to forget that it is not the subject matter, but the student, that makes the services "special." When the petitioners say that the "educationally deprived children are thus normal children who happen to be slow readers,"⁵⁴ they exhibit a remarkable ignorance of the academic and psychological damage that chronic slow reading does to a child. Reading is to the mind what eating and exercise are for the body. Permanent slow reading means permanent mental malnutrition.

Congress recognized that special educational services, like remedial reading and arithmetic, were beyond the

⁵³*Id.* at 12-13.

⁵⁴*Ibid.*

capacities, if not the will, of most local public school districts and nonpublic schools. In the best tradition of federal concern for the needy and neglected, Congress devised Title I of ESEA. Given its broad scope and execution, any effect that Title I has on church related schools is strictly secondary and indirect. The primary effect is clearly secular and religiously neutral: the provision of special educational services, completely under public control and operation, to educationally deprived children, regardless of their creed or the school they attend.

3. *Excessive Entanglement*

The doctrine of "excessive entanglement," as developed by this Court, has two facets, administrative and political. The administrative facet prohibits excessive governmental involvement with the educational process operated by church related schools, and particularly excessive governmental surveillance in order to distinguish between what is "secular" and what is "religious" in those processes. The political facet prohibits legislation that has a serious potential of generating political divisiveness along religious lines. *Lemon v. Kurtzman*, *supra* at 615-24.

With regard to the administrative facet of excessive entanglement, it is quite clear that Title I projects do not involve the government at all with what parochial school teachers teach. Whether a child is educationally deprived or not is determined by standard, objective, religiously neutral tests. Once the determination is made that a child is educationally deprived and that he qualifies for assistance under a Title I project, public school teachers take over the task, under public supervision, of attempting to cure the child's deficiency. The fact that the

public school teachers may do so on church related, school property involves no more forbidden contact with religion than the fact that public nurses provide health care in the school infirmary, or that public educational personnel visit and inspect the school and its operations to ensure compliance with the compulsory education laws and reasonable educational standards. Church related school property is not an enclave upon which public personnel are forbidden to enter.

The publicly employed teacher, moreover, does not suffer from that "inherent conflict" of which this Court spoke in *Lemon v. Kurtzman*, *supra* at 618-19 (1971). There is no division of loyalties, conscious or unconscious. The Title I teacher has one job to do, and one superior to whom to respond. The fear that the publicly employed teacher might "bootleg" religion into the remedial reading or arithmetic classes, in an effort to curry favor with the church related school authorities, is a makeweight argument which, regardless of intention, is an unworthy aspersion, wholly unsupported by anything in the record of this case, on the fidelity of public employees and the integrity of church related school authorities.

The second facet of the excessive entanglement test is political divisiveness along religious lines. This facet of the entanglement test first appeared in the *Lemon* decision of 1971 and must be carefully compared, as the Court itself did in *Lemon*, with what the Court said in the *Walz* decision of 1970 about the right of the churches to speak out on political issues. It is well known, for example, that many churches gave strenuous support to the civil rights legislation of 1964, 1965 and 1968. It would, however, be a rare lawyer—to say the least—who would suggest that such religious support makes the civil rights legislation unconstitutional.

It would also be the rare lawyer who would suggest that anytime the churches are not unanimous about particular legislation, the legislation is unconstitutional. The Sunday Closing Law Cases settled that matter flatly to the contrary. *McGowan v. State of Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Koshher Super Market*, 366 U.S. 617 (1961). So did the more recent selective conscientious objector decisions: *Gillette v. United States* (with *Negre v. Larsen*), 401 U.S. 437 (1971).

Because the "political divisiveness" doctrine obviously raises the most serious questions, both about the other First Amendment rights of churches and church members (speech, press, assembly, association, and petition for redress of grievances) and about the point at which religious controversy paralyzes the potential and authority of the government to take effective secular action, the doctrine must obviously be read in the light of the exact facts to which it has been applied. The only kind of legislation to which the doctrine has been applied is legislation for the benefit of a relatively small number of religious groups, legislation that was unconstitutional for other independent grounds (in *Lemon*, excessive surveillance; in *Nyquist* and *Sloan*, an impermissible primary effect).

Moreover, as we have already pointed out, the net effect of this Court's decisions in the "aid to parochial schools" area has been to hold some forms of assistance constitutional and others unconstitutional. *It cannot be unconstitutional to seek what is constitutional.* If Title I projects are constitutional under the purpose, effect, and first facet of the excessive entanglement test,

as we have shown they are, they are also constitutional under the second facet of the entanglement test. The second facet may be a "broader base" for unconstitutionality (*Lemon v. Kurtzman*, *supra* at 622), but only when one of the other grounds is already present. Any other doctrine means that it is unconstitutional for the advocates of nonpublic schools to seek what this Court has repeatedly said it is constitutional for the legislatures to give.

C. *Decisive Distinctions from Invalid Forms of Assistance.* Petitioners urge, however, that "insofar as the basic constitutional issues are involved," the present case is indistinguishable from *Lemon-DiCenso-Johnson* (1971) and *Levitt-Nyquist-Sloan* (1973). Petitioners seek to equate special educational services provided under Title I projects with "basically every-day regular instruction in subjects such as reading and arithmetic," and suggest that, at least in practice, the church related schools and not the public authorities will actually be designing, operating and supervising the Title I projects.⁵⁵

There is absolutely nothing in the record of this case to support these contentions by petitioners. We have already noted, in our discussion of the "effect" test, petitioners' belittling of the damaging academic and psychological effects of chronic slow reading on the elementary school child. Again, it is the student, not the subject matter, that makes the educational services "special." Moreover, the educational techniques are also specialized, involving far smaller classes than are customary in public or nonpublic schools and consequently providing far greater individual

⁵⁵See Petitioners' Brief, pp. 26-27.

attention to the student. *Little Red Riding Hood* may not seem like specialized reading matter, but when a ten-year-old child still can't read it, that child is in serious academic trouble. He will never escape without specialized reading instruction.

Petitioners' suggestion that church related schools, rather than public school districts, will be the real designers, operators and supervisors of Title I projects flies in the face of the statute, regulations and guidelines. Since petitioners have succeeded so far in blocking any special instructional services in nonpublic schools in Missouri, they have no local experience to draw upon.

We have already suggested, in our discussion of the ripeness question, that the lack of any experience in Missouri with the kind of special educational services ordered by the Court of Appeals in this case, plus the great variety of possible designs for such services, makes it inappropriate for the Court at this time to pass on the constitutionality of such services. At this point, however, we make a much more strenuous contention: that it would be a deprivation of respondents' right under the Due Process Clause to their day in court for this tribunal to accept a law review article as a substitute for evidence.

Moreover, petitioners utterly ignore the very basic and constitutionally significant factual distinctions between this case and the "school aid" decisions of 1971 and 1973. In this case, we have a general program aimed at *all* disadvantaged children, not only those in nonpublic schools. In this case there is no support, direct or indirect, of any basic or existing case the money flows only to public agencies, not to nonpublic schools, teachers or parents. In this case all teachers are public employees. All programs are publicly operated, not just publicly supervised or audited. Public

authorities, in order to operate Title I projects, do not have to make any distinctions between what is secular and what is religious in the classes conducted by the nonpublic schools. Finally, ESEA is a federal program aimed at the nationwide problem of educationally deprived children, not a state attempt to keep nonpublic schools within its jurisdiction in a state of financial viability.

The constitutional significance of these factual distinctions is obvious, and has already been discussed in our analysis of the facts and law of this case under the purpose-effect-entanglement test. The generality and totally public character of Title I ESEA projects not only distinguish them from the types of educational assistance declared invalid by this Court in 1971 and 1973, but clearly bring them within the area of assistance declared by this Court at the same time to be constitutionally permissible.

D. Furtherance of Positive Constitutional Values. In addition to satisfying the requirements of the purpose-effect-entanglement test, Title I of ESEA promotes several positive constitutional values. The most obvious is assistance to educationally deprived children. The constitutional legitimacy of such an objective is too well established to warrant discussion in this day and age. The inclusion, however, of such children in attendance at nonpublic schools also serves positive constitutional values: the accommodation of the parental rights of all those parents who, for whatever reason, choose to send their children to nonpublic schools; the accommodation of the free exercise rights of those parents who choose church related schools for religious reasons (see *Zorach v. Clauson*, *supra*); and the accommodation of academic freedom and the role of private institutions in American

education by not adding still another burden of disqualification from governmental assistance on those who choose to attend these schools.

The "school aid" decisions of 1973, including *Norwood v. Harrison*, 413 U.S. 455, establish beyond any shadow of doubt that nonpublic schools do not stand on the same footing with respect to government aid as public schools. The same decisions, however, also establish, equally beyond doubt, that there is an area of permissible assistance. We have shown that Title I ESEA projects are within that area under the purpose-effect-entanglement test. It is a constitutional plus, not a minus, that the permissibility of the inclusion of children attending nonpublic schools in Title I projects will enhance the educational and religious freedom of American parents, children, and teachers and will contribute, at least in some small way, to the survival of pluralism in American education.

CONCLUSION

First, for the reasons stated herein, this *amicus* respectfully requests that the Court affirm the judgment of the Court of Appeals for the Eighth Circuit on the grounds assigned in its majority opinion. Secondly, however, should this Court pass upon the constitutional issue raised by the petitioners, USCC asks that the Court decide that question against the petitioners' claims. Specifically, this *amicus* requests that the Court hold that the authority provided by 20 U.S.C. 241e(a)(2) for publicly employed personnel to perform special, remedial instructional services for the assistance of educationally deprived children on the premises of nonpublic, church related schools during regular school hours, is not in violation of the First Amendment to the Constitution of the United States.

Respectfully submitted,

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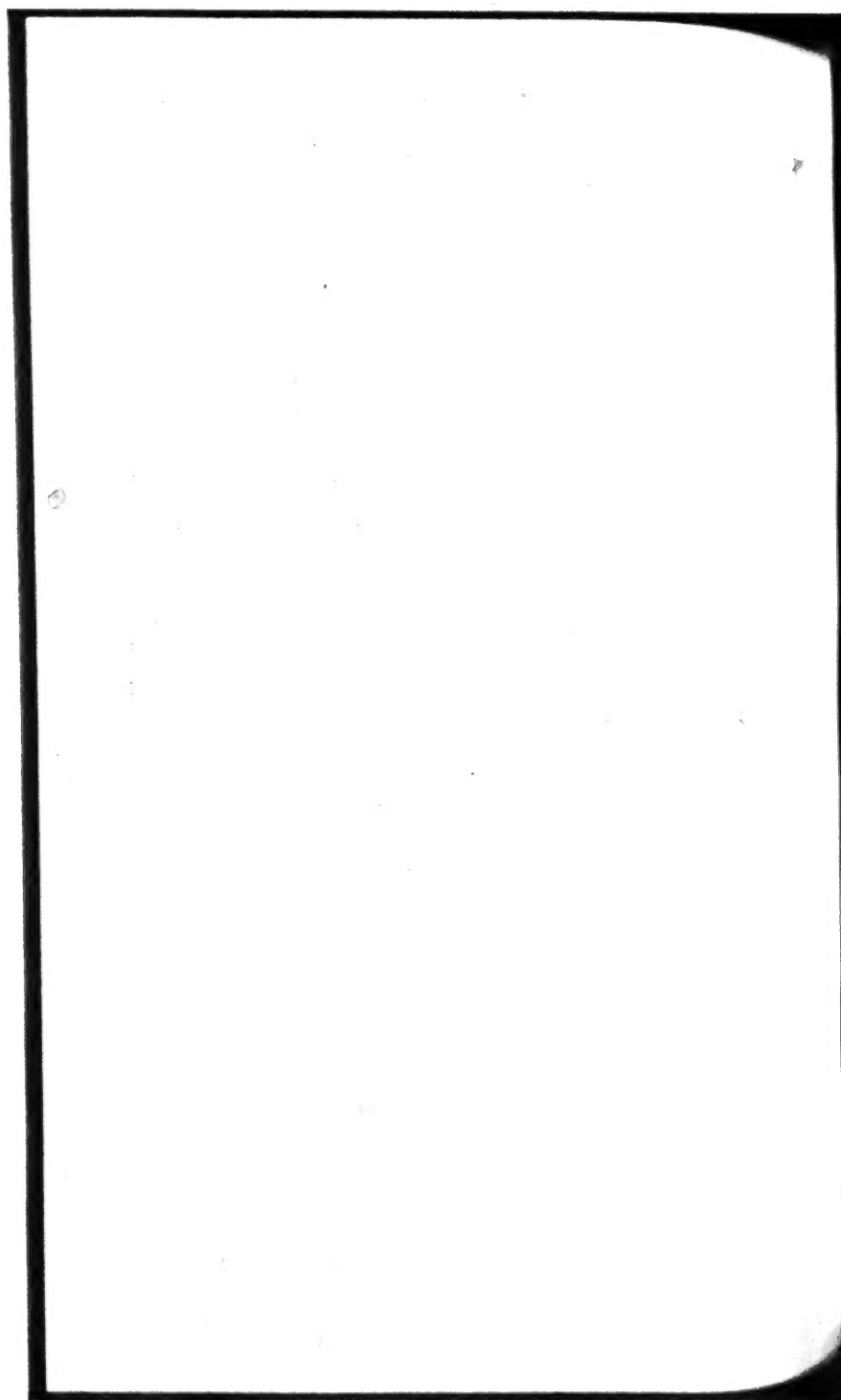
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, individually and in his capacity as
former Commissioner of Education, State of Missouri,
MISSOURI STATE BOARD OF EDUCATION, et al.,
Petitioners,

VS.

ANNA BARRERA, individually and as Next Friend
for JOANNA BARRERA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

In this reply brief we obviously cannot comment on everything in the respondents' 95-page brief, much of it devoted to matters not within the scope of the questions on which this Court granted certiorari¹ or to claims we have not made in this proceeding nor now make.² We limit ourselves to brief comments and a few points asserted by respondents which we consider significant to the issues in this case.

1. For example, pp. 41-46, which argues that "Title I project expenditures in Missouri indicate gross inequity."

2. For example, pp. 57-61, which argues that "Title I authorizes public school personnel to provide special educational services to deprived children on private school premises." Petitioners have not and do not challenge that assertion in this proceeding. They claim only that Title I does not require it, and if it does it is to that extent unconstitutional.

1. The Status of Missouri Law

On pp. 23-24 respondents characterize as "erroneous," "inaccurate" or "false" our statement that "providing Title I ESEA services on private school premises is contrary to Missouri law." On pp. 56-57 they develop this point further.

If, as the Court of Appeals held, Title I mandates assignment of publicly employed teachers to serve in religious schools state law to the contrary notwithstanding, then, of course, under the Supremacy Clause state law must yield and the status of Missouri law becomes irrelevant. Conversely if, as we contend, such a mandate would violate the First Amendment, the question of Missouri law again becomes irrelevant. It is only relevant if, as we contend, Title I only authorizes but does not mandate assignment of Title I teachers for on-premises services. Even in such a case its relevance is limited. It shows at most that the petitioners' policy does not constitute an arbitrary exercise of statutorily delegated discretion. (We by no means concede that even if not violative of state law, petitioners could not for other reasons establish a policy of non-assignment.)

So limited, it is quite clear that as far as the Federal government is concerned, it is the state department of education that determines what the relevant state law is. See Handbook p. 19, quoted on p. 20 of our brief. More specifically, the United States Office of Education was fully cognizant of the situation in Missouri and asserted that it was "well aware that certain types of arrangements involving private school children which may be legal in some States are not permitted under Missouri Law." (Petitioners' brief, p. 19.)

Responsibility for approving proposed Title I projects in each state is delegated by the Act to the state depart-

ments of education. It would be inappropriate and beyond the intent of Congress that a department's interpretation of its own relevant state law could be challenged in a Federal court.

2. Nature of Title I Services

On p. 24 of their brief respondents state:

"Petitioners state that Title I services are 'basically everyday regular instruction.' (Petitioners' Brief, p. 26.) This statement is untrue. * * *

Page 26 of our brief reads:

"We noted in our Statement of Facts and Issues (*supra*, p. 9) that the Title I financed services *at issue in this case* are basically every-day regular instruction in such subjects as reading and arithmetic, the same subjects taught in the private schools in the *Lemon-DiCenso-Johnson* cases. * * *" (Emphasis added.)

On p. 24 of their brief, respondents state (elaborated on pp. 69-70):

"Petitioners state that Title I does not include welfare benefits such as medical or dental care, breakfasts and lunches, or even psychological services for maladjusted children. (Petitioners' Brief, p. 13.) They also indicate that mentally retarded and emotionally disturbed children are not eligible. These statements are untrue. * * *

On p. 9 of our brief we note that the Regulations cite as illustrative examples of Title I services, "therapeutic, remedial or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services." On p. 12 we note that in *St. Louis* (and elsewhere in Missouri) mentally retarded or emotionally

disturbed children are not eligible. The reason for the statements we do make is found on p. 13 of our brief:

"We have set forth this statement of the facts to *narrow the issues facing this Court*. We do not have *here* any controversy regarding welfare benefits, such as medical or dental care, breakfasts and lunches, or even psychological services for maladjusted children. We are dealing only with what is basically every-day, regular instruction given in elementary and secondary schools, somewhat intensified for the benefit of slower children. * * *" (Emphasis added.)

3. Employment of Nonpublic School Teachers

On p. 24 of their brief respondents state (elaborated on pp. 71-72):

"Next, Petitioners state that it is permissible to employ regular nonpublic school teachers under Title I. This statement is untrue. Title I does not permit payment of a salary of a private school teacher. * * *"

Nowhere in our brief do we intimate that a private school teacher may simultaneously receive salaries from private school and Title I funds. Our statement, based upon pp. 34-35 of the Handbook to which we respectfully refer the Court, is that it is permissible to employ regular nonpublic school teachers to become Title I teachers, and even to train them before they become Title I employees so long as they are committed to do so.

In our brief (p. 34) we quoted from *Lemon* that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." We suggested in our brief and repeat here that this difficulty will not be eliminated or

even substantially reduced by the fact that the teacher is transferred from the payroll of the religious school to that of the local educational agency, and that the only way to guard against inculcation of religious values by such a teacher is by that "comprehensive, discriminating, and continuing state surveillance" which the Establishment Clause forbids.

4. Teacher Aides

On p. 25 of their brief respondents state (elaborated on pp. 72-73):

"Petitioners also state that Title I teacher aides may assist regular nonpublic school teachers. (Petitioners' Brief, p. 36.) This statement is untrue. * * *

The relevant portion of p. 36 of our brief reads:

"* * * The constitutional infirmity lies not in the failure of the state to prohibit it, but rather in the constant and continuing surveillance necessary to make the prohibition meaningful. The same is true of the use of Title I teacher aides to assist regular teachers when they are not busy with their Title I activities. *The Program Guide forbids this*, but enforcement would require continuing on the spot policing; * * *" (Emphasis added.)

5. Petitioners' Standing

On pp. 82-87 of their brief respondents assert that the "State Board of Education has no standing to challenge the constitutionality of Title I, ESEA, or of its program."

We do not, of course, challenge the constitutionality of Title I or even that part of it which requires that provision be made for including special educational services and ar-

rangements in which children enrolled in religious or other nonpublic schools can participate. We assert only that to accede to respondents' demand that Title I teachers be assigned to serve in religious schools during regular school hours would violate the Establishment Clause of the First Amendment. We are unable to see how public officials called upon by private citizens to perform an act the former deem unconstitutional cannot assert the claim of unconstitutionality as defense in a suit to compel them to perform the act.

In any event, the standing of members of a state school board to challenge even affirmatively the constitutionality of a statute requiring them to act in a way deemed by them to be unconstitutional is no longer open to question in view of the holding in *Board of Education v. Allen*, 392 U. S. 236, 241, footnote 5 (1968).

6. The Justiciability of the Constitutional Issue

On pp. 87-88 respondents contend that the constitutional issue was not timely presented and that in any event it is not now ripe for determination.

In respect to timeliness, we note that the constitutional issue as now before this Court was presented to and exhaustively argued in the District Court. Since the District Court held that the Act does not mandate assignment of Title I teachers to serve in religious schools, it found it unnecessary to pass upon the constitutional issue, although it did note that if its interpretation of the statute was incorrect "then the teachings of the Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) would raise serious questions as to the constitutionality of Title I." Pet. for Certiorari, p. A44. The constitutional issue was again thoroughly argued in the Court of Appeals, and that Court held that mandatory assignment of Title I teachers

to serve in religious schools did not violate the Establishment Clause. On the basis of that decision, the District Court issued an Injunction and Judgment in Compliance with Mandate (of the Court of Appeals) stating specifically and expressly: "Defendants are enjoined from disapproving any application of a Local Educational Agency (LEA) for the grant of Federal Title I ESEA Funds on the basis that such application includes use of Title I personnel on private school premises during regular school hours." Pet. for Certiorari, p. A46. (This injunction and judgment was prepared by respondents and signed by the District Court judge exactly as submitted by them.)

As a precautionary measure, on June 6, 1973, petitioners filed in the District Court a notice of appeal to the Court of Appeals from the said injunction and judgment. On July 5, 1973 petitioners filed in this Court a petition for writ of certiorari to review the judgment of the Court of Appeals, or in the alternative for a writ of certiorari under 28 U.S.C. Section 2101(e) to review the District Court's order and judgment before judgment of the Court of Appeals. On October 15, 1973 this Court granted the petition for certiorari without indicating under which alternative the grant was made. On October 25, 1973, the Court of Appeals on application of the petitioners suggesting mootness by reason of the granting of the petition herein, dismissed the appeal from the District Court's injunction and judgment.

Whether this Court is considering the case under a writ of certiorari to review the judgment of the Court of Appeals or to review the judgment of the District Court, we submit that by reason of these circumstances the constitutional question of the assignability of Title I teach-

ers to serve in religious schools is fully ripe for determination by this Court.

Respectfully submitted,

HARRY D. DINGMAN

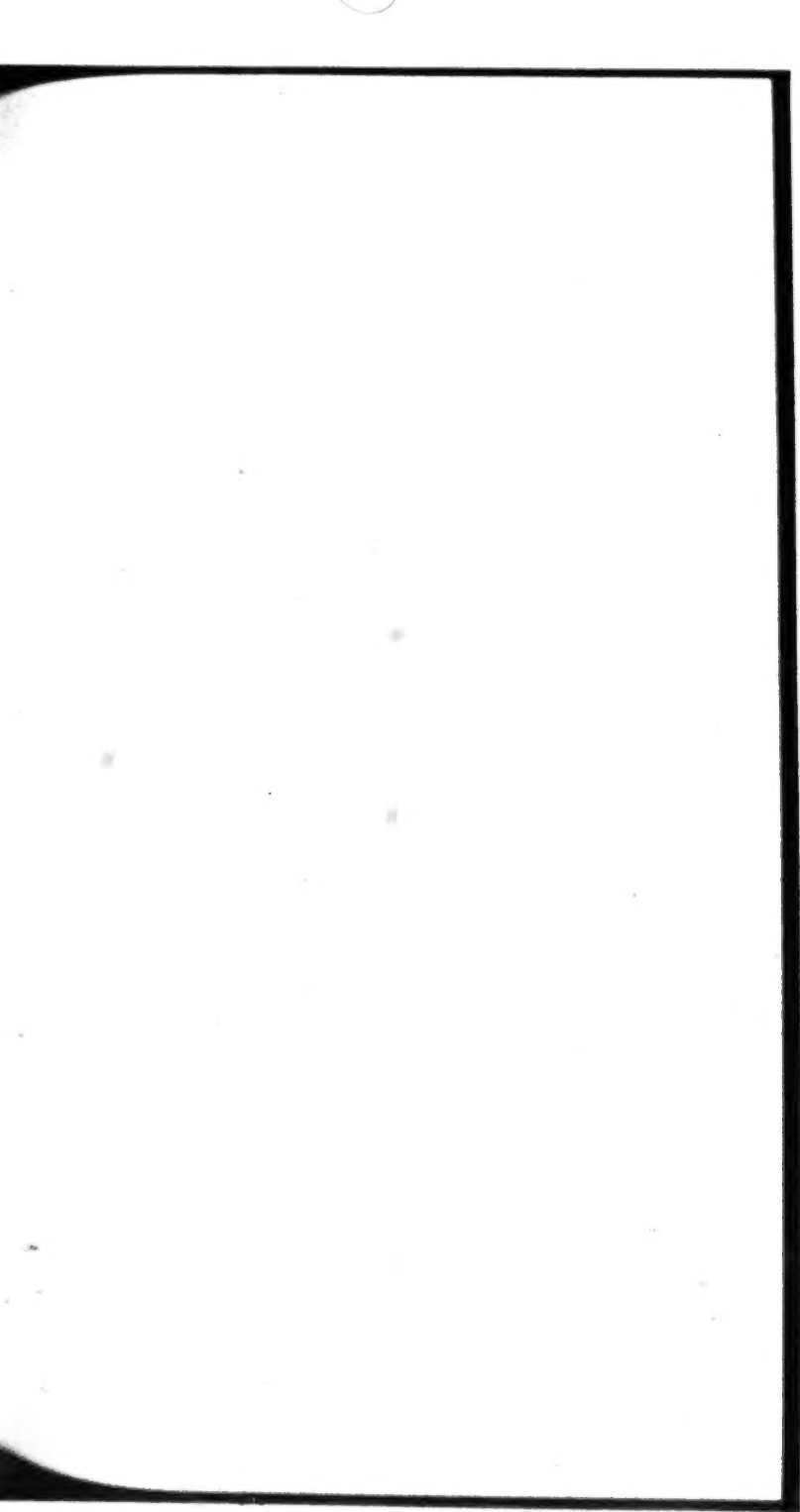
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IN THE

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OCTOBER TERM, 1973

No. 73-62

Supreme Court, U.S.

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HUBERT WHEELER, *et al.*,

MICHAEL RODAK, JR., *CLE*
Petitioners,

—v.—

ANNA BARRERA, *et al.*,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
AMERICAN CIVIL LIBERTIES UNION, AMERICANS
UNITED FOR SEPARATION OF CHURCH AND STATE,
NATIONAL EDUCATION ASSOCIATION, AMERICAN ETH-
ICAL UNION, AMERICAN HUMANIST ASSOCIATION,
UNITARIAN-UNIVERSALIST ASSOCIATION, COMMITTEE
FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY
(NEW YORK), OHIO FREE SCHOOLS ASSOCIATION,
AND PRESERVE OUR PUBLIC SCHOOLS (WISCONSIN)
AS AMICI CURIAE**

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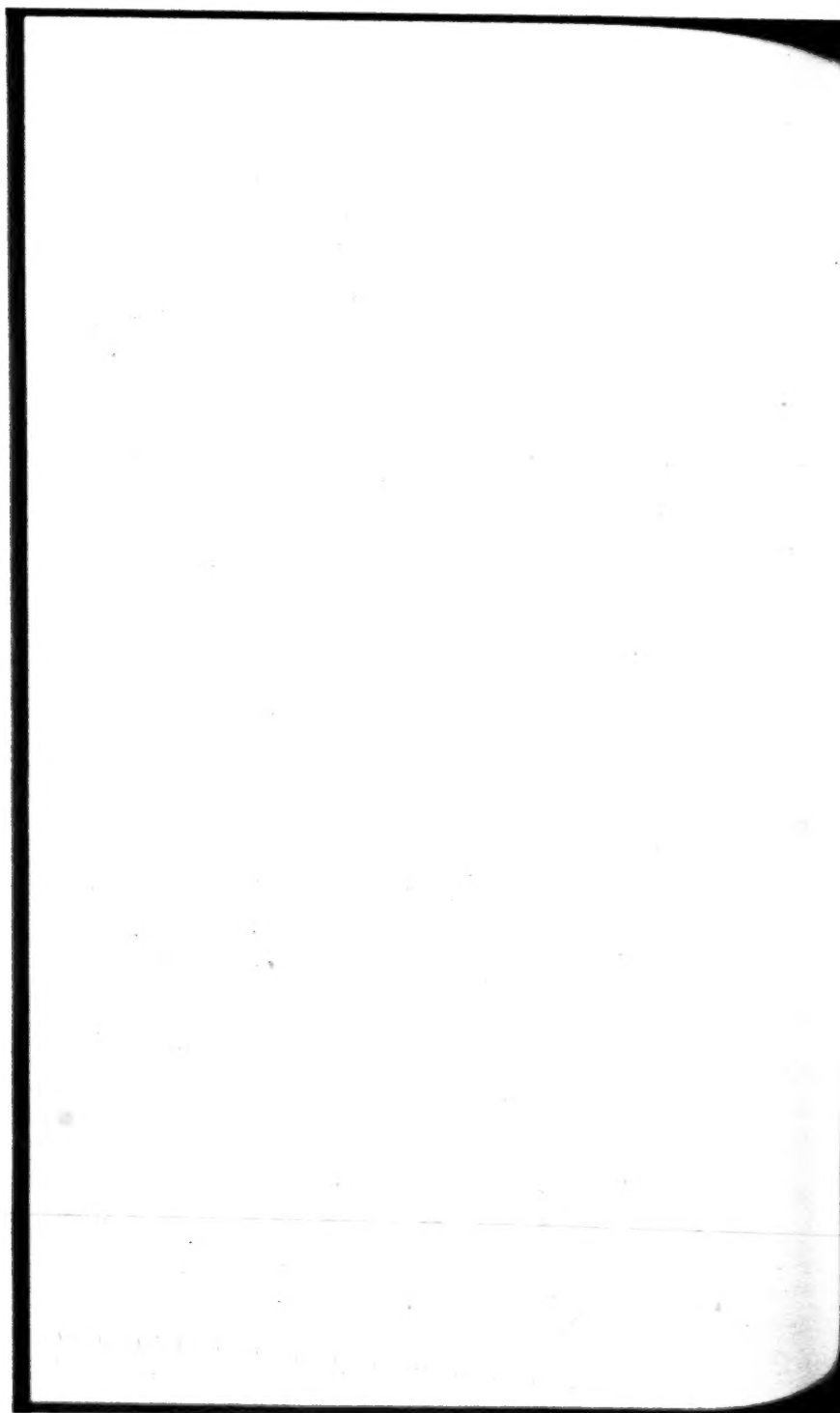
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

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Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The *amici curiae* are non-profit, non-partisan organizations having a nation-wide membership of persons of all religious views and sects, including citizens of Missouri. They are devoted to the preservation and protection of the fundamental principles guaranteed to citizens of this country by the federal and state constitutions. They believe in the historic, basic American doctrine of separation of church and state and that only by its steadfast and strict observance can the religious freedom of all of the people be assured.

The *amici* are concerned over the numerous "severe contests" (to use Jefferson's words to describe the battles engaged in by him and by Madison to achieve constitutional religious freedom and separation of church and state) which are being waged today in the national and state legislatures, courts and executive branches to determine

whether the principles embodied in the Establishment Clause are to prevail against the ever expanding and more demanding claims of aggressive and dominant religious bodies and their leaders for public support of their sectarian schools.

The *amici* are concerned about the vast sums of public moneys, amounting to millions of dollars, that are being channeled, directly or indirectly, into sectarian schools by various sophisticated devices designed to circumvent the Constitutional prohibition. They are concerned about the efforts continually being made to extend the "verge" of constitutionality referred to in *Everson v. Board of Education*, 330 U.S. 1 (1947), and in *Sloan v. Lemon*, 413 U.S. 825 (1973). They are concerned over the number and variety of ingenious plans being devised for channeling state aid to sectarian schools in circumvention of the constitutional prohibition.

The *amici* believe that Title I of the Federal Elementary and Secondary Education Act of 1965, as construed by the Court of Appeals below, presents another such "ingenious plan" which violates the constitutional mandate against the sponsorship or financial support of religion or religious institutions and does not meet the cumulative criteria and tests recently enunciated by this Court for a statute to be constitutional under the Establishment Clause.

We believe this brief will be of assistance to the Court in resolving the important constitutional issues present in this case.

Respectfully submitted,

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BRIEF AMICI CURIAE

Interest of Amici

The interest of *amici* is set out in the preceding motion for leave to file.

The Question Presented

This brief is directed only to the constitutional issue raised by the decision in the Court of Appeals. That issue, as stated in the petition for certiorari, is as follows:

"If the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241e(a)(2), requires that, notwithstand-

ing contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?"

This question is substantially embodied also in one of the issues stated in the pre-trial order (App. pp. 37-8), as follows:

"Is it lawful to make personnel, who are employed to implement Title I projects, available on private school premises during regular school hours in order to provide special services to educationally deprived children attending private schools?"

While this brief is addressed only to the constitutional issue, *amici* support the position of the ~~respondents~~^{defendants}, the District Court and the dissenting Circuit Judge that Title I does not mandate the furnishing of publicly employed teachers to teach in sectarian schools during regular school hours and that defendants are not required to violate the Constitution of Missouri in their use of Title I funds, as would occur if plaintiffs succeeded in obtaining the relief sought in the complaint and if defendants were required to carry out the mandate of the Court of Appeals.

Statement of the Case

Plaintiffs, respondents here, are parents of children attending nonpublic, parochial schools in Missouri. Suing individually and on behalf of the minor plaintiffs, they brought this class action in the United States District Court, Western District of Missouri, "on behalf of all educationally deprived children attending nonpublic schools" in the State of Missouri and prayed in their complaint for Defendants, petitioners here, are the Commissioner of Education of the State of Missouri and members of the Missouri State Board of Education (App. pp. 13-14).

This action concerns the interpretation, application and constitutionality of Title I of the Elementary and Secondary Educational Act of 1965, as amended (20 U.S.C. §§241a-241m, 242-244) which comprises a plan by which federal funds are granted to local public educational agencies for the purpose of providing programs for the special needs of educationally deprived children within local school districts.

Section 241e thereof (20 U.S.C. §241e) provides in pertinent part, as follows:

(a) A local educational agency may receive a grant under this sub-chapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commission may establish)—

(1) that payments under this subchapter will be used for programs and projects (including the acquisition

of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs * * * and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this subchapter.

(2) That, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; . . .

The declared policy of Title I is to provide grants of federal funds to local educational agencies to assist them in expanding and improving their educational programs by various means which contribute particularly to meeting the

special educational means of educationally deprived children (20 U.S.C. §241a).

Plaintiffs allege that children attending nonpublic sectarian schools in Missouri are being arbitrarily denied, by the defendants, Title I funds and benefits to which they are entitled. More particularly, they assert that defendants have refused to provide publicly employed teachers to perform their educational and teaching functions under Title I programs on the premises of sectarian schools during school hours. In Missouri, Title I funds are paid to the State Board of Education which, in turn, allots funds to local School Boards.

Most of the Title I programs and funds in Missouri involve remedial reading, mathematics and languages, which are all secular subjects. Most of the funds allocated thereunder for public schools are used to pay the salaries of teachers and teachers' aides to give instruction in those secular subjects.

Defendants have refused to approve any applications for the allocation of Title I funds for the purpose of paying publicly employed teachers to give instruction in such subjects in sectarian schools during regular school hours. Defendants assert that for them to do so would violate the constitutional provisions and decisional law of Missouri; also, that Title I does not mandate their providing and assigning publicly employed teachers to sectarian schools during regular school hours and that if it did, it also would be unconstitutional under the First Amendment.

Defendants have approved Title I programs and the use of Title I funds to provide mobile educational services and

equipment, visual aids and educational radio and television in sectarian schools and teachers for after-school, weekend and summer school classes on public school premises, which are available to parochial school pupils.

Plaintiffs assert that such programs are not "comparable" to those provided in public schools, particularly in that they do not provide for the assignment for publicly employed teachers to parochial schools during regular school hours to carry out the instruction incidental to such programs.

Initially, the District Court dismissed Plaintiffs' action on procedural grounds and the Court of Appeals reversed and remanded the case to that Court for trial. *Barrera v. Wheeler*, 441 F.2d 795 (8 Cir., 1971). Plaintiffs then applied for a preliminary injunction and in a pretrial order the District Court stated the issues to be tried and decided (App. p. 37); see, also, *Barrera v. Wheeler*, 475 F.2d 1338 at 1341 (8th Cir., 1973).

After trial, the District Court, in an unreported opinion filed June 2, 1972 (Pet. for Cert. p. A 43; App. pp. 7, 39-40), denied plaintiffs' prayer for injunctive relief holding (1) that Title I does not mandate the assignment of teachers paid by Title I funds to nonpublic schools; (2) that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs and through visual aids and mobile equipment; and (3) that there is no evidence that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds or that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level, except those requesting

publicly salaried teachers in nonpublic schools. The District Court Judge also expressed the view that an interpretation of Title I, which would require the assignment of publicly employed teachers in parochial schools, "would raise serious questions as to the constitutionality of Title I" under the "teaching of the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)."

The United States Court of Appeals for the Eighth Circuit, in a 2-1 decision [475 F.2d 1338 (1973)] reversed the District Court on the facts and the law and held, *inter alia*, that Title I mandated the assignment of publicly employed and paid teachers to nonpublic schools during regular school hours. It remanded the case to the District Court with instructions to enter an injunctive decree, containing guidelines. (Pet. for Cert. pp. A29-A30).

Dissenting Circuit Judge Stephenson (475 F.2d at 1358) stated that Title I "clearly *only permits* and does not mandate the assignment of public school teachers to private schools during school hours as clearly evidenced from the Acts' Legislative history." He also stated that if Title I does mandate the assignment of public school teachers to private schools, then he shared the District Judge's "grave concern that Title I, under such circumstances, could not withstand the constitutional challenge" and that the "entanglements" fostered by Title I, as so construed, "appear quite indistinguishable from the excessive entanglements proscribed by *Lemon*."

The injunction and judgment filed by the District Court on the remand enjoin and require defendants to furnish publicly employed teachers to teach private school children during regular school hours on the premises of the private

school attended by those children, if publicly employed teachers are furnished to public school children during regular school hours on the premises of the public school attended by those children. (Pet. for Cert. p. A-45)

Thus, the Constitutional issue has been raised by the decision of the Court of Appeals and its interpretation of the statute.

Summary of Argument

Title I [20 U.S.C. §241e (a)(2)] violates the Establishment Clause of the First Amendment of the Federal Constitution if, as construed by the Court of Appeals, it mandates the assignment of public employed teachers to non-public schools during regular school hours to render teaching services in remedial subjects.

Such a practice would constitute financial aid and support to religious institutions and religion and would involve the government in religious activity.

Nonpublic sectarian schools are religious institutions having an overall, basic purpose of religious indoctrination and religion permeates this entire curriculum and plant.

Constitutionally, there is no essential difference between a public subsidy that supplies teachers and teaching materials to a sectarian school and one that supplies cash to such a school for teachers and teaching materials, or accomplishes the same result indirectly by other devices.

Nor is there any constitutional difference between furnishing a publicly employed teacher to teach secular subjects in a sectarian school and paying the salaries of sectarian school teachers to teach secular subjects there, or

between the teaching of "general" secular subjects such as mathematics, languages and reading and the teaching of "specialized" secular subjects such as remedial reading, languages and mathematics.

Title I, as so construed, would violate the Establishment Clause because, at the very least, it would foster an excessive government entanglement with religion, administratively and politically; and also, because, it would not have a primary effect that neither advances nor inhibits religion. Moreover, if the real and underlying purpose of this statute is, as may be, to provide public financial assistance to sectarian schools by relieving such schools of certain educational expenses, then it would not have a secular legislative purpose.

Under the prior decisions of the Court and other courts, Title I, as construed and applied by the Court of Appeals, would clearly be in violation of the Establishment Clause of the First Amendment of the Federal Constitution, as well as in violation of the Missouri Constitution as construed by its highest Court.

ARGUMENT

If, as the majority of the Court of Appeals has held, the assignment of publicly employed teachers to nonpublic schools during regular school hours is mandated by Title I, then that act would be unconstitutional under the Establishment Clause of the First Amendment of the United States Constitution.

The Court of Appeals' majority has held that the assignment of publicly employed teachers to nonpublic schools during regular school hours is required by Title I. The majority took note of, but bypassed, the constitutional question on the ground that it would be "improper" for it "to pass on the constitutionality of an abstract program of remedial teaching services" not properly before it (*Barrera v. Wheeler*, 475 F.2d at 1353-4). Nevertheless, it took occasion to express, by way of dictum, the idea that the prior court decisions, holding that public funded teaching services on private school premises is unconstitutional, are "not directly controlling" because of their suggested distinction between "general" secular educational subjects and "specialized" secular educational subjects and services.

The dissenting Circuit Judge expressed "complete agreement" with the District Judge's conclusion that "Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools" and "shared" the District Judge's "grave concern" that Title I, as so interpreted, "could not withstand the constitutional challenge."

It is submitted that, as thus interpreted by the Court of Appeals, Title I clearly violates the First Amendment of the Federal Constitution, which provides in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The purpose of the Establishment Clause was not simply to prevent the establishment of a state church or state religion, but to uproot all kinds of religion-state relationships. It was intended to create a complete and permanent separation of the spheres of religious activity and civil activity by comprehensively forbidding every form of public aid or support, direct or indirect, for religion. *Everson v. Board of Education*, 330 U.S. 1, 31-2 (1947) (Rutledge, J., dissenting); *McCollum v. Board of Education*, 333 U.S. 203, 213, 232 (1948) (concurring opinions); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 493-4 (1961); *Abington School District v. Schempp*, 374 U.S. 203, 216-221, 229-30 (1963).

"No law respecting an establishment of religion" was intended to cover any step that could lead to such an establishment or any practice historically associated with, or incidental to an establishment. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

In earlier, basic cases in this area, this Court formulated and often reiterated the simple forthright test that:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion."

Everson v. Board of Education, 330 U.S. 1, 15-16 (1947); *McCollum v. Board of Education*, 333 U.S. 203, 210 (1948);

Zorach v. Clausen, 343 U.S. 306, 314 (1952); *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lemon v. Kurtzman*, 403 U.S. 602, 640-2 (1971) (Douglas, J., concurring). In its most recent decision (*Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5160), this Court again quoted that principle, thus recognizing its continued vitality. Many States, including Missouri, have constitutions or statutes prohibiting such support, directly or indirectly. See W. Gelhorn and R. Kent Greenawalt, "The Sectarian College and the Public Purse," Appendix B at 183-203 (1970); Missouri Constitution, Art. IX, Section 5; Art. I, Section 7; Art. IX, Section 8 V.A.M.S.

The highest court in Missouri has held that public funds may not be used to send public school teachers into parochial schools to teach speech therapy (*Special District for the Education and Training of Handicapped Children v. Wheeler*, 408 S.W. 2d 60 (1966)).

Recently this Court has stated that the main evils which the Establishment Clause was designed to prevent were "sponsorship, financial support and involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5157 (1973).

As Mr. Justice Douglas, concurring, said in the *Abington School District v. Schempp*, 374 U.S. 203, 229 (1963):

"The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools."

Mr. Justice Black, who wrote the Court's opinion in *Everson, supra*, certainly did not believe that anything said there justified the use of public funds to pay the salaries of teachers in sectarian schools, because in his dissenting opinion in *Board of Education v. Allen*, 392 U.S. 236 (1968), he pointed out that tax-raised funds could not constitutionally be used to support "religious schools" or "to pay their teachers," not even "to the extent of one penny"; and he warned that the effort to have the salaries of religious school teachers paid with public funds would be forthcoming.

Sectarian or parochial schools of whatever denominations are religious institutions. They are an integral part of the religious mission, and probably the most vital part, of the parish or church that operates them. Their very purpose is to propagate a religious faith and to indoctrinate their students in that faith. The secular education which they provide is incidental to that general purpose. Such schools involve substantial religious activity and purpose and religion permeates the entire curriculum and school. The teachers generally are religiously trained teachers and members of that religion and the students are generally selected on the basis of their religious beliefs and church connections. If that were not so, there would be no point in having such a school. A few non-adherents may be admitted to these schools, but the school's goal would be frustrated if it did not adhere to its religious purposes. See,

generally, *Everson v. Board of Education*, 330 U.S. 1, 22-24 (1947) (Jackson, J., dissenting); *Board of Education v. Allen*, 392 U.S. 236, 262, *et seq.* (1968) (Douglas, J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 615-616 and 628, *et seq.* (Douglas, J., concurring); *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5156 (1973); *Americans United for Separation of Church and State v. Oakey*, 339 F. Supp. 545, 553 (1972); *Wolman v. Essex*, 342 F. Supp. 399, 404-5, 419 (1972); *Public Funds for Public Schools of N. J. v. Marburger*, 358 F. Supp. 29, 33-4 (1973).

Manifestly, parochial schools are religious institutions. Any kind or amount of public support, direct or indirect, for such schools is an aid and support of religion. Obviously, teachers are absolutely essential to the operation of a sectarian school and its educational processes and teachers' salaries are probably the largest item of expense of such a school.

There is no difference, constitutionally, between the use of public funds to furnish publicly employed teachers to sectarian schools and the use of public funds to pay the salaries of teachers employed in the sectarian schools. Both constitute financial support of the sectarian school and of religion and are unconstitutional. Whether the public subsidy takes the form of supplying teachers and teaching materials to sectarian schools instead of furnishing cash to the school for such teachers and materials is constitutionally immaterial.

Moreover, there is no essential constitutional difference between (1) statutes such as those involved in the *Lemon* and *DiCenso* cases, under which public funds are used to pay the salaries of teachers employed in sectarian schools

for teaching secular subjects, such as mathematics, modern foreign languages and physical science; and (2) a statute, such as that involved here, under which public funds would be used to pay the salaries of publicly employed teachers sent into sectarian schools for the teaching of secular subjects such as remedial reading, mathematics and languages.

Nor is there any essential constitutional difference between the teaching of "general" secular subjects, such as mathematics, reading, languages and science and the teaching of "specialized" secular subjects such as remedial reading, languages and mathematics, as the Court of Appeals suggests.

What Mr. Justice Douglas said in his concurring opinion in the *Lemon* case, at page 641, is particularly appropriate here.

Yet, in spite of this long and consistent history there are those who have the courage to announce that a State may nonetheless finance the *secular* part of a sectarian school's educational program. * * * A history class, a literature class, or a science class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes. The funds are used in these cases to pay or help pay the salaries of teachers in parochial schools; and the presence of teachers is critical to the essential purpose of the parochial school, *viz.*, to advance the religious endeavors of the particular church. It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or

science without any trace of proselytizing enables the school to use all of its own funds for religious training. . . . And sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones.

Under the "cumulative criteria" or "tests" developed by the Court in its more recent decisions, in order for a statute to pass muster under the Establishment Clause, it first "must reflect a clearly secular legislative purpose"; second, it "must have a primary effect that neither advances nor inhibits religion"; and third, it "must avoid excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13; *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5157-8.

Title I, as interpreted by the Court of Appeals, does not meet one or more of these tests and thus violates the Establishment Clause. See *Lemon v. Kurtzman*, *supra*; *Earley v. DiCenso*, 403 U.S. 602 (1971); *Sanders v. Johnson*, 403 U.S. 955 (1971); *Americans United for Separation of Church and State v. Oakey*, 339 F. Supp. 545 (1972); *Public Funds for Public Schools of N. J. v. Marburger*, 358 F. Supp. 29 (1973); *State ex rel. Chambers v. School District No. 10*, 155 Mont. 422, 472 P.2d 1013 (1970); *Klinger v. Howlett*, — Ill. — (Oct. 1973); *Wolman v. Essex*, 342 F. Supp. 399 (1972), *aff'd*, 409 U.S. 808 (1972); *Special District for the Education and Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Sup. Ct. of Mo., en Banc (1966)).

The *Lemon* case involved a Pennsylvania statutory program which provided financial support to nonpublic elementary and secondary schools by way of reimbursement

for the cost of teachers' salaries, textbooks and instructional materials in certain specified subjects—mathematics, modern or foreign languages, physical science and physical education. This was effected by the device of authorizing the State Superintendent of Public Instruction "to purchase" specified "secular educational services" from non-public schools. The program was limited to the aforesaid secular subjects and instructional materials and prohibited reimbursement for any course teaching religion, morals or a form of worship.

The *DiCenso* case involved a Rhode Island statute authorizing State educational officials to pay to teachers of secular subjects in nonpublic elementary schools part of their salaries, by way of "salary supplements." The teachers were required to teach only secular subjects, to use only secular teaching materials and not to teach a course in religion.

This Court held that both of these statutes violated the Establishment Clause because they involved "excessive entanglement between government and religion." In distinguishing the *Everson* and *Allen* cases, *supra*, which involved bus transportation and textbooks, the Court pointed out:

"We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

Where any teacher is functioning on sectarian school premises, and in immediate contact with sectarian school administrators and teachers, there is always a danger that

the secular and religious aspects of the instruction will not be separated. As Mr. Justice Douglas points out in his concurring opinion in *Lemon*, at page 635, "Sectarian instruction can take place in a course on Shakespeare or in one in mathematics." Moreover, it can take place just as well in the instruction of remedial secular subjects, as in the instruction of general secular subjects.

In *Sanders, et al. v. Johnson, et al.*, 403 U.S. 955 (1971), this Court affirmed, *per curiam*, a decision of a three Judge District Court [319 F. Supp. 421 (1970)] which held to be violative of the Establishment Clause a state statute authorizing the State Board of Education to contract with privately owned nonpublic elementary and secondary schools, including parochial schools, for the public purchase of "secular, educational services" to be supplied to school children. Such services were defined as "providing instruction in a secular subject." The District Court held the statute to violate the Establishment Clause in that the primary effect of the statute was one which advances religion and was not primarily secular in effect and involved an improper degree of government entanglement with religion.

In *Americans United for Separation of Church and State v. Oakey, supra*, the Court held unconstitutional under the Establishment Clause, a Vermont Act which provided that a school district could provide State-approved, public school teachers to parochial schools to teach certain secular subjects, more particularly, physical sciences, modern languages, mathematics and physical education. Teachers were to remain under the supervision of public school authorities.

The Court, citing *Lemon*, *DiCenso* and *Walz, supra*, held such a statute "surely involves excessive entanglement be-

tween government and religion," and a potential for church involvement in the political process" and "for the impermissible fostering of religion." What the Court said there concerning the Vermont statute is equally applicable to Title I, as interpreted to mandate the furnishing of publicly employed teachers to parochial schools, to wit:

"The Vermont Act will thrust the state not only directly into the physical plants of the schools but also into their operation and control. As such it surely involves excessive entanglement between government and religion.

"It is contended that because all the hiring of instructors and all the buying of teaching materials for the statutorily specified secular subjects is arranged for by the local school districts, there will be but little entanglement between church and state. The actual mechanics of this intrusion by the employees of the school districts into the sectarian schools is not spelled out in the statute. Presumably, the implementation of the plan is left to the school districts themselves. The potential, however, for involvement of the state, through the school districts, in religious affairs is not dispelled by its lack of articulation.

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"We have, thus far, concentrated on the potential entanglement resulting from state-sponsored involvement in religious affairs. The statute also creates a similar potential for church involvement in the political process.

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"While our approach on the entanglement issues could dispose of this case, we also point out that in the

operation of this statute a potential exists for the impermissible fostering of religion. We are not convinced that the statute as written guarantees that the parochial school utilization of school district teachers would not have the primary effect of the advancement of religion. As was noted in *Lemon*, the use of teachers—even for so-called secular subjects—on any program that utilizes sectarian facilities involves variables which are not, prior to program operation, readily ascertainable. The existence of those variables is not likely to be dispelled by the fact that the secular teachers are not hired by, and are theoretically responsible to, the public school superintendent. * * * Once within the church school, however, the instruction would become subject to pressures which the Court has warned use would make religious neutrality extremely difficult. The sectarian mission of the church-based parochial school cannot be overemphasized. It is unlikely that such schools carried on under religious auspices would exist if it were not for that mission. * * * Even without overt attempts to influence the teaching program of the secular instructor, the teacher would still be subject to the subtle but effective pressure of parochial administrative and religiously oriented parental approval. Moreover, the atmosphere of religion quite properly pervades the plant of a parochial school. Whether he be hired by the district or by the parochial school, no one can predict how any teacher will act or react when placed in that atmosphere.”

In *Public Funds for Public Schools of New Jersey v. Marburger, supra*, the District Court held to be unconstitutional under the Establishment Clause, a State statute,

very much like Title I, which authorized the public education authorities to make available to nonpublic schools "auxiliary services," including remedial instructions in reading, mathematics, speech and physical education, to be performed in the nonpublic schools by publicly employed teachers. In holding that such programs involved an excessive church-state administrative and political entanglement, the Court said, at page 40:

"The defendants argue that no surveillance would be required to enforce State limitations in the auxiliary program because the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic. Even though this argument is sound, to a degree, a teacher who teaches reading or remedial reading remains a teacher. A teacher's instruction may vary in content or emphasis and is not entirely predictable. A teacher is not a textbook, the contents of which remain constant, as the Court recognized in *Lemon*.

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"This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and non-ideological subject matter.

"Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not

employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints. See *Lemon v. Kurtzman*, *supra*, 403 U.S. at 619, 91 S. Ct. 2105.”

Those comments are directly applicable here.

In *State ex rel. Chambers v. School District No. 10*, *supra*, the Supreme Court of Montana held violative of the State and Federal Constitutions, a school board resolution calling for a special tax levy to pay teachers, as full time employees of the public school district, to teach a standard course of secular instruction to students of parochial high school on the premises thereof. The Court, citing decisions of this Court, pointed out that parochial schools are religious institutions wherein religious and secular instruction is intermixed and that “if teachers were to be furnished at public expense to a parochial school, it would not be possible to determine where the secular purpose ended and the sectarian began.”

Klinger v. Howlett, *supra*, involved several Illinois parochial statutes enacted June 26, 1972, including one pro-

viding auxiliary service grants to parents of nonpublic school children. Auxiliary services included a provision for "remedial and therapeutic programs for educationally disadvantaged children." The Illinois Supreme Court held that provision, as well as others, unconstitutional under the Establishment Clause.

Wolman v. Essex, supra, involved an Ohio statute under which public funds could be used both for educational grants to parents of nonpublic school children and to provide to pupils attending nonpublic schools, services and materials including remedial reading and speech programs. The district court, after reviewing the prior decisions of this Court, held the statute to be unconstitutional under the Establishment Clause in that the statute did not have a valid secular purpose, and that it was doubtful that the statute neither advanced nor inhibited religion and that the statute fostered an excessive government entanglement with religion, administratively and politically.

See also *Special District for the Education and Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Sup. Ct. of Missouri, En Banc 1966).

Clearly, Title I, as so construed, involves, at the very least, excessive government entanglement with religion, administratively and politically, for the reasons discussed in the above cases, particularly, *Lemon*, *DiCenso*, *Nyquist*, *Oakey* and *Marburger*. Also, as so construed, this statute has a purpose and primary effect that advances religion, for the reasons discussed in one or more of those cases. There is no assurance that the state supported activity now authorized and mandated under this statute will not be used for religious indoctrination.

Despite any legislative declaration to the contrary, the underlying purpose of this statute is to financially assist sectarian schools by supplying them with publicly paid teachers to teach remedial secular subjects and thus to relieve the sectarian schools of the financial burden of obtaining their own teachers for the purpose of performing such teaching services. This, in turn, would release funds of the sectarian schools for their other educational purposes designed to carry out the religious purpose of the schools.

In recent years and since *Everson*, most of the legislative acts which have provided public assistance to sectarian schools have contained legislative declarations that the statute is for a public secular purpose. Despite the ingenious devices which are used to disguise the real purpose of such statutes, the underlying and undeclared purpose is to provide public aid and support to sectarian schools. The courts are not bound by such legislative declarations of policy (see *Nyquist, supra*). So, here, the court can find that the real, underlying purpose of this statute, as construed, is to provide financial support to sectarian schools by the means of supplying them with publicly paid teachers.

CONCLUSION

The constitutional issue presented here is whether Title I funds must be, or even may be, used to furnish publicly employed teachers to sectarian schools to give instruction therein in secular subjects, such as remedial reading, mathematics and languages. If the Missouri educational authorities do that, they will violate the State Constitution and decisional law of that State. They will also violate the First Amendment of the Federal Constitution.

This case simply involves one more ingenious plan for channeling state aid to sectarian schools. It requires no prophet to foresee that on the argument used to support Title I, as so interpreted, other arguments could be made for the use of public funds to supply publicly employed school teachers on the premises of sectarian schools to teach every secular subject in the curriculum.

Despite Madison's warning ("Memorial and Remonstrance", Appendix to dissenting opinion of Rutledge, J. in *Everson v. Board of Education* 330 U.S. 1, 63, 65) the simple, forthright Constitutional principles embodied in the Religious Clauses of the First Amendment are becoming entangled in corrosive precedents, and citizens are being compelled through taxation to support religious schools, not simply to the extent of "three pence", but to the extent of many millions of dollars. This is being accomplished by a seemingly infinite variety of ingenious and sophisticated devices designed to circumvent the constitutional prohibitions and to make it appear that this support is not for the benefit of religious schools, but only for the benefit of pupils or their parents or the public welfare. Cf. "Edu-

cation in a Democracy: Financial Support of Private, Public and Parochial Schools," pp. 17-28, Human Rights, Volume Three, Number One (Summer, 1973) (Journal of the Section of Individual Rights and Responsibilities of American Bar Association).

It is respectfully submitted that the judgment of the Court of Appeals herein should be reversed and that the case should be remanded to the District Court for a dismissal of the complaint.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, ET AL., PETITIONERS

v.

ANNA BARRERA, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A38) is reported at 475 F. 2d 1338. The opinion of the district court (Pet. App. A39-A44) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A48-A49) was entered on March 16, 1973. The petition for a writ of certiorari was filed on July 5, 1973, and was granted on October 15, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

**CONSTITUTIONAL, STATUTORY AND REGULATORY
PROVISIONS INVOLVED**

The First Amendment to the Constitution of the United States provides in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 241e, provides in part:

(a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria, as the Commissioner may establish)—

(1) that payments under this subchapter will be used for programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, * * * and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly

operated programs and projects under this subchapter * * *;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *.

Title 45, Section 116.19 of the Code of Federal Regulations provides in part:

(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such arrangements as dual enrollment, educational radio and television, and mobile educational services and equipment. * * *

(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that

used in providing for the participation in the program by educationally deprived children enrolled in public schools.

(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. * * *

(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and only when such services are not normally provided by the private school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. * * * Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the

paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities.

Commissioner of Education, Title I Program Guide No. 44, 4.5 (1968) provides in part:

The needs of private school children in the eligible areas may not be identical with those of public school children and, hence, may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. "Comparability" of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children.

QUESTIONS PRESENTED

1. Whether Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a, *et seq.*, requires that public school teachers provide special educational services, such as remedial reading, on the premises of religiously-affiliated private schools.
2. Whether Title I, to the extent it permits such services, violates the Establishment Clause of the First Amendment.

INTEREST OF THE UNITED STATES

This case presents important questions respecting the meaning and constitutionality of Title I of the Elementary and Secondary Education Act. In implementation of the policy of the United States to improve the quality of education in this country, Title I provides financial assistance to local educational agencies serving areas with high concentrations of educationally deprived children from low-income families. Since the adverse educational effects of poverty are not limited to children in public schools, but also afflict children in private schools, Title I provides that the assistance thereunder should benefit both categories of children. We are informed by the Commissioner of Education that his most recent compilation of state reports (for fiscal year 1971) shows that approximately 6,000,000 public school children and 350,000 private school children received services under Title I.

The United States Commissioner of Education is responsible for the overall administration of Title I. He has promulgated regulations governing the operation of that title, including the participation in its remedial programs of children enrolled in private as well as public schools. The United States is vitally concerned that, in deciding this case, the Court interpret and apply Title I and the Commissioner's implementing regulations in a way that properly effectuates the important public interests the statute and the regulations are designed to accomplish. The United States also has a strong interest in defending the constitutionality of Title I.

STATEMENT

This case raises statutory and constitutional questions regarding the obligation of the State of Missouri under Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a, *et seq.* ("Title I"), to provide special educational services to educationally-deprived children attending religiously-affiliated private schools. The respondents (plaintiffs in the district court) are the parents of children attending such schools in Missouri. The petitioners (defendants in the district court) are the Missouri Commissioner of Education and members of the State Board of Education.

1. *The Statute and the Regulations of the United States Commissioner of Education.*— Title I provides funds to local educational agencies to meet the needs of educationally-deprived children in school attendance areas having high concentrations of children from low-income families (20 U.S.C. 241e(a)(1)). An "educationally deprived child" is defined by the regulations of the United States Commissioner of Education as one who needs special educational assistance to raise his level of educational attainment to that appropriate for a child of his age (45 C.F.R. 116.1(i)).

The United States Commissioner of Education allocates the funds to the States. State educational agencies, in turn, distribute the funds to local educational agencies under a statutory formula based on the number of children from low-income families in each school district (20 U.S.C. 241e(a)(2)). In order to

obtain funds, a local educational agency must submit a written application to the State educational agency proposing a project to meet the special educational needs of educationally-deprived children. State agencies are authorized to approve any program, consistent with criteria prescribed by the Commissioner, which gives "reasonable promise" of meeting the needs of such children (20 U.S.C. 241e(a)(1)).

The Congressional declaration of policy in Title I (20 U.S.C. 241a) states that "[i]n recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs," it is "the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Title I authorizes financial assistance only for special programs, such as remedial reading and mathematics classes, which are designed to meet the needs of educationally-deprived children. To insure that other expenditures are not reduced upon the receipt of federal funds, the Act states that the funds will be used "to supplement and, to the extent practical, increase the level of funds that would * * * be made

available from non-Federal sources * * * (20 U.S.C. 241e(a)(3)(B)(i)), and "in no case [will Federal funds be used] * * * to supplant such funds from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(ii)).

The statute requires that a local agency must provide services under Title I programs to disadvantaged children enrolled in both public and private schools.¹ The Act provides that a public agency must retain "control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency * * * and that a public agency will administer such funds and property." 20 U.S.C. 241e(a)(3)(A). Local agencies furnishing such services to private school children are subject to the guidelines established by the Commissioner of Education, which provide, *inter alia*:

The services provided with Title I funds must always remain under the administrative direction and control of a public agency. These services may not be administered by the private school.

¹ The statute permits the State educational agency to make a grant to a local educational agency only upon its determination that, among other things, "to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate * * * [20 U.S.C. 241e(a)(2)]."

No Title I funds may be used for religious worship or instruction.²

In accordance with the Commissioner's regulations (45 C.F.R. 116.19(e)), all Title I programs are operated by public education agencies, and all persons performing services under those programs do so as employees of the public agencies.

Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private school children (*e.g.*, prohibition against dual enrollment).³ Accordingly, Title I programs may be provided in a different manner to private and to public school children. For example, remedial services for private school students might be provided outside their regular classroom, while being provided in the regular classroom for public school students. In addition, the content of the services could differ if the "special educational needs" required to be met under 20 U.S.C. 241e(a)(1)(A) of the two groups differ. The Commissioner of Education, however, has sought to assure that the different forms in which the services may be furnished to the two categories of children provide equally a reasonable promise of meeting the needs of the children, by requiring that the services supplied to private school children "must be comparable in quality, scope and opportunity for participa-

² HEW, Office of Education, Title I ESEA Participation of Private School Children, A Handbook for State and Local Officials, pp. 12-14. These requirements are based on 45 C.F.R. 116.19(e) and 20 U.S.C. 885.

³ The Handbook, *supra*, pp. 19-20, sets forth in detail the scope of a local agency's authority to take these restrictions into account when developing Title I services for private school children.

tion to those provided for public school children with needs of equally high priority" (Commissioner of Education, Title I Program Guide No. 44, 45 (1968)).

2. *The Proceedings Below.*—This litigation was commenced by the parents of children attending religiously-affiliated schools in Missouri. They alleged that Title I services were being arbitrarily denied to Missouri private school children, because those services furnished to their children allegedly were inadequate. They sought an injunction requiring the local educational agencies to provide their children with teaching services comparable to those furnished to public school children with Title I funds, and allowing public school teachers to provide special services in private schools during regular school hours (App. 20-21).

The district court held that Title I did not require that private school children receive equivalent educational programs, but only that they receive services representing an "equitable mathematical share of Title I funds" (Pet. App. A43). Finding that plaintiffs could be furnished their proper dollar amount of services in after-hours and summer school programs (Pet. App. A41, A43), the court denied plaintiffs' requested injunction (Pet. App. A44).

The court of appeals, with one judge dissenting, reversed. The court held that the Commissioner's guidelines requiring "comparability" between services to private and public school children contemplated that the programs must be comparably designed to meet the needs of the two groups of children, and not merely equivalent in dollar amount expended (Pet. App. A12-A16). Concluding that the services previ-

ously furnished the plaintiffs' children were not equivalent, the court remanded the case to the district court to establish guidelines for a Title I program for private school children "comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29-A30).

The court also rejected the defendants' contention that the Missouri law allegedly prohibiting the provision of services by public teachers on private school premises could override the requirements of Title I. The court held that:

* * * state and local educational agencies cannot lawfully provide services for eligible public school children and at the same time deny comparable programs to eligible private school children by simply commingling such [Title I] funds with proscribed state "public funds." * * * Thus, we find that when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services * * * to be furnished by the public agency on private as well as public school premises [Pet. App. A24-A25].

The court declined to decide the constitutionality of permitting public school teachers to provide Title I services on private school premises. It pointed out that "no particular program * * * is mandatory under the Act. * * * A local educational agency may request Title I funds for a variety of uses, and none of these specific remedial programs are now before us" (Pet. App. A26-A27). It concluded (*id.* at A26) that "it would be improper for us to pass on the

constitutionality of an abstract program of remedial teaching services which are not properly before us."

On the remand, the district court entered a decree directing the defendants to comply with the requirements of Title I as announced by the court of appeals (Pet. App. A45-A47). Among other things, the judgment requires that all Title I applications "shall provide services and activities which meet the special need of such pupil and which are comparable and equitable in quality, scope and opportunity for participation to those provided to eligible public school pupils similarly situated" (*id.* at A46). The court also ordered (*id.* at A45-A46) that "when the needs of eligible children require it, special personnel services may be furnished under Title I by the public agency on private as well as public school premises, and further if such special personnel services are furnished public school children during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends."

Petitioners appealed from that judgment of the district court (Pet. App. A51-A52) but, after this Court granted the petition for a writ of certiorari, filed a suggestion of mootness with the court of appeals, which then dismissed the appeal (Pet. Br. 9).

ARGUMENT

INTRODUCTION AND SUMMARY

The petition for certiorari in this case presented two questions: (1) whether Title I "require[s] that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools * * *" and (2) if the Act so requires, whether it violates the Establishment Clause of the First Amendment (Pet. 2).

We submit, however, that the court of appeals did not hold that Title I *requires* that such services be provided in private schools, but only that it *permits* them to be so furnished. The precise holding of the court of appeals on this point was as follows

* * * Title I *authorizes* special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises [Pet. App. A25, emphasis added].

Earlier in the opinion, the court had stated that the district court had "agreed with the defendants' contention that the Act does not permit the assignment of public school teachers to non-public schools" (*id.* at A16-A17), and that it viewed as error "the district court's interpretation of Title I as involving a broad proscription of public teacher services in the private schools * * *" (*id.* at A18).⁴

⁴ Although the dissenting judge interpreted the majority opinion as holding that "Title I *mandates* the assignment of public school teachers to private schools" (Pet. App. A38, emphasis in original), neither the language of the majority opinion nor its legal analysis indicates that the court so construed the statute.

The statutory issue in this case, therefore, is not whether Title I compels local educational authorities to provide remedial educational services on the premises of religiously-affiliated schools, but whether it authorizes them to do so. We submit that the language and the legislative history of the statute require an affirmative answer to that narrower question. They both show that the local school authorities are given broad discretion to determine how to provide Title I services, subject only to the guidelines of the Commissioner of Education designed to insure that services provided to public school children are comparable to those furnished to private school children.

The court of appeals remanded the case to the district court to establish guidelines that would provide private school children with an adequate Title I program. In the circumstances, the court of appeals correctly declined to decide the constitutionality of the use of public teachers to provide remedial educational services on the premises of religiously-affiliated schools. The precise form in which those services will be provided under the guidelines of the district court has not yet been determined, and it is not known whether the program will involve the presence of public teachers on private school premises. The court of appeals thus correctly refused to decide "important constitutional questions on an abstract or hypothetical basis" and to "pass on the constitutionality of an abstract program of remedial teaching services which are not properly before us" (Pet. App. A26).

Under the settled practice of this Court in constitutional adjudication, we submit that it, too, should not decide the constitutional issue which petitioners raise in the abstract and hypothetical context in which it is presented. Before deciding that issue, it should await the formulation of the specific detailed plan for providing those services which will be established and which will place the constitutional issue in a concrete context. Indeed, the issue petitioners raise before this Court may never have to be decided, since the program may not involve the use of public school teachers in providing the remedial services on private school premises. Moreover, if the plan adopted does provide for public school teachers to enter the private school premises, the precise manner in which the services are there provided may itself be a significant factor in determining the constitutionality of the program.

Finally, we shall show that, if the Court deems the constitutional issue ripe for review, the use of public school teachers to furnish the special remedial educational services on private school premises would not violate the Establishment Clause of the First Amendment. The Title I programs are similar to those types of aid to religiously-affiliated schools that this Court has upheld under the Establishment Clause. The programs are not designed to aid religiously-affiliated schools, but to aid all educationally deprived children no matter which schools they attend. The Title I programs do not involve the kind of excessive government entanglement in religion which led to the invalidation of the State plans providing direct

aid to religiously-affiliated schools and their teachers in *Lemon v. Kurtzman*, 403 U.S. 602, and do not create the serious potential for political divisiveness that also concerned the Court in those cases.

I. TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AUTHORIZES BUT DOES NOT REQUIRE PUBLIC SCHOOL TEACHERS TO FURNISH REMEDIAL EDUCATIONAL SERVICES ON PRIVATE SCHOOL PREMISES

Both the language and the legislative history of Title I show that, although Congress intended that all educationally deprived children, whether enrolled in public or private schools, were to receive the remedial educational programs for which the statute provides, it also gave the local educational agencies great latitude in devising programs to accomplish that objective. Title I provides for grants to local educational agencies "upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)" that several standards have been met (20 U.S.C. 241e(a)). These include that the programs will be "designed to meet the special educational needs of educationally deprived children * * *" (20 U.S.C. 241e(a)(1)(A)), and will be "of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs * * *" (20 U.S.C. 241e(a)(1)(B)). Title I also requires that "to the extent consistent with the number of educationally deprived children in the school district * * * who are enrolled in private * * *

schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate" (20 U.S.C. 241e (a)(2)).

The Senate Committee report on Title I stated:

* * * consistent with the number of educationally deprived children in the school district who are enrolled in nonpublic * * * schools, the local educational agency will make provision, under the terms of the act, for including special educational services and arrangements. * * *

It should be emphasized, however, that no suggested program is in itself mandatory upon a public school authority. The selection of an appropriate program or programs, for which State educational authority approval is sought, rests with the local educational agency.

Thus, the act does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to * * * students who are not enrolled in public schools [S. Rep. No. 146, 89th Cong., 1st Sess. 11-12].

Similarly, the House Committee report on the 1966 amendments to Title I, which were made the year after the statute was enacted, pointed out:

From the earliest consideration of the Elementary and Secondary Education Act it was the intention of the committee that educationally deprived children be reached by the public school system regardless of the school a child regularly attended. Thus, it was provided that public programs would be offered to educa-

tionally deprived children enrolled in non-public schools without requiring those children to be in fulltime attendance in the public school. Extremely broad authority was therefore given local school districts in the types of projects and programs that they could devise, including health and welfare projects only indirectly related to elementary education, in order to assure that such programs and projects could operate as a part of the public school system in conformance with local and State legal and constitutional requirements [H. Rep. No. 1814, 89th Cong., 2d Sess. 3-4].

The Senate Committee report on the Act made it clear that, where necessary to accomplish the objectives of Title I, public school teachers could provide special remedial educational services on private school premises. It stated:

It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school [S. Rep. No. 146, 89th Cong., 1st Sess. 12].

See also the remarks of Rep. Carey and Rep. Perkins, managers of the House Bill, 111 Cong. Rec. 5747-5748.

The regulations of the United States Commissioner of Education, which mainly track and amplify the

statutory standards, and the guidelines of the Office of Education confirm that the local educational agencies have broad discretion to select the particular method of providing Title I services that they consider most appropriate. For example, the regulations provide that applications by local educational agencies "must propose projects of sufficient size, scope and quality as to give reasonable promise of substantial progress toward meeting the needs of educationally deprived children for whom the projects are intended" (45 C.F.R. 116.18(a)). The Commissioner's Title I Program Guide No. 44, 4.5 (1968) states: "The needs of private school children in the eligible areas * * * may require different services and activities." Similarly, the Office of Education's handbook provides:

Basically the law requires that the local educational agency (LEA) must provide special educational services for educationally deprived children enrolled in private schools * * * Nowhere is a particular method prescribed or mandated [Title I ESEA Participation of Private School Children, A Handbook For State and Local Officials, p. 1].*

The court of appeals thus correctly stated (Pet. App. A26) that "no particular program, curriculum or service is mandatory under the Act." In recognition of the special problems involved in providing remedial services to educationally deprived children

* See also letter of July 3, 1967, by the Assistant Commissioner of Education, stating: "* * * Title I does not require that private school children be served through any particular type of arrangement" (Def. Ex. 7, Vol. VII, Appendix in Court of Appeals).

who may have a variety of different problems that require correction, Congress and the Commissioner of Education wisely left it to the informed judgment and discretion of the local education agencies to determine how such services can best be provided to the children requiring them.* This discretion is subject to the Commissioner's supervisory authority to insure that the local programs meet the "basic criteria" that he has "establish[ed]" (20 U.S.C. 241e(a)) to insure compliance with the Congressional purpose of "meeting the special educational needs of educationally deprived children" (20 U.S.C. 241a). This flexibility enables the local educational agencies to develop adequate programs for children attending religiously-affiliated schools which take account of any special provisions of state law governing such schools, such as prohibitions upon dual enrollment of children in both private and public schools.

In order to insure that any differences between the programs provided for public and private school children do not result in supplying the latter with inferior services, the Commissioner has required that

* In exercising this discretion some local educational agencies in Missouri have indicated their desire to provide Title I services during regular school hours on private school premises, but they were prevented from doing so by a State Department of Education regulation prohibiting public school teachers from going onto the premises of a private school during such time. This regulation is based on the Education Department's determination (contrary to an opinion of the Missouri Attorney General, No. 26, 1970) that Title I funds are subject to prescriptions in the state constitution against the use of public funds to provide services to private school students (Pet. App. A19-A20).

Title I programs for private school children must be

* * * comparable in quality, scope and opportunity for participation to those provided for public school children with needs of equally high priority [Commissioner of Education, Title I Program Guide No. 44, 4.5 (1968)].

Here, as in the Act and other regulations and guidelines, the Commissioner has merely directed that the Title I services provided to private school children must be "comparable" to those provided to public school children. He has not attempted to direct the local educational authorities how to insure that comparability or what form it should take. He has not even suggested, let alone provided, that such comparability should be achieved by having public school teachers provide Title I services on private school premises. He has left it to the local educational agencies to make that decision.

Similarly, the court of appeals has not directed, although it has permitted, such use of public school teachers in providing comparable Title I services to private school children. The court did hold that the district court had erred in concluding that the Commissioner's "comparability" standard was satisfied by providing the private school children with a proportionate dollar amount of Title I services since this remedy failed to consider whether the services furnished private school children, such as after-school or summer classes, offered a promise of success equal to those afforded public school children. Concluding that the methods previously used by the local agency (after-school classes and summer programs) did not

provide such a comparable program, the court remanded the case to the district court for the development of guidelines which would assure Missouri private school children "participation in a meaningful program * * * comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29-A30).¹

The court of appeals' statement (Pet. App. A25) that "when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services * * * to be furnished by the public agency on private as well as public school premises" does not indicate that the State was required so to use public school teachers. To be sure, the court of appeals recognized (Pet. App. A23-A24) that if Missouri law precludes the furnishing of "comparable programs" for private school children, the consequence would be that the State either would have to change its law "or deprive all its educationally disadvantaged children of the economic benefits of the Act." In that situation, however, the choice would be for the State to make, and the State would be required to choose not because federal law requires that public school teachers supply the services on private school premises but because the State itself provides that the services cannot be furnished in the private schools.

¹ In view of the uncontroverted testimony of educational experts that such after-school programs for private school children are not comparable in effectiveness or promise of success to those provided during the regular school day for public school children, the court of appeals correctly held that such services do not meet the requirements of the Act and regulations (Pet. App. A11-A16).

Title I and the Commissioner's regulations require only that there be no discrimination between private and public school children in the furnishing of remedial educational services; they leave it to the local agencies to determine how they will provide comparable services to both categories of children.

II. THIS COURT SHOULD NOT DECIDE WHETHER THE PROVISION OF TITLE I SERVICES ON PRIVATE SCHOOL PREMISES IS CONSTITUTIONAL, SINCE THE QUESTION IS PRESENTED IN A HYPOTHETICAL AND ABSTRACT CONTEXT WHICH IS NOT A PROPER FRAMEWORK FOR RESOLVING THE ISSUE.

Although petitioners argue at length (Br. 26-42) that "Assignment of publically employed personnel to teach in religious schools during regular school hours violates the Establishment Clause of the First Amendment," that question is not actually involved in this case at this time. There is no more occasion for this Court to decide it than there was for the court of appeals to do so.

As we have pointed out (*supra*, pp. 14, 22-23), the court of appeals did not direct that public school teachers provide Title I services on private school premises, but merely authorized them to do so. It remanded the case to the district court to develop guidelines for Title I programs that will assure Missouri private school children "participation in a meaningful program * * * comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29-A30). The precise form that such program ultimately will take, however,

has not yet been determined. There is no way of knowing whether the program ultimately adopted will provide Title I services on private school premises or, if it does, under what circumstances and conditions it will be done. Indeed, the State could adopt a program for furnishing Title I services to public and private school students on a comparable basis that would not involve the presence of any public school teachers on private school premises.

The order the district court entered on the remand (Pet. App. A45-A46) provided that "special personnel services may be furnished under Title I by the public agency on private as well as public school premises," and that if such services are furnished public school children "during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends."

The first portion of that provision, however, only authorizes but does not require that Title I services be furnished on private school premises. The second portion requires the provision of those services on private school premises only if the State also provides them to public school children "during regular school hours and on the public school premises where the pupil regularly attends." If the State decides to provide the services in the public schools either after regular school hours or in a different school from

that which the children regularly attend, it is not required to provide any services on private school premises but only to provide private school children with services that are "comparable and equitable in quality, scope and opportunity for participation to those provided to eligible public school pupils similarly situated" (Pet. App. A46). The method by which, the form in which and the place where such comparable services are to be provided, however, is under the order left to the discretion of the State educational authorities.

Moreover, even if the services were provided on private school premises, the manner in which that is done may be significant in determining their constitutionality. For example, the result might be different if services were provided for two hours a week on private school premises by a regular public school teacher than if provided by a private school teacher hired by the school authorities for that purpose.

It is a well-settled principle of constitutional adjudication that this Court will not "'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (Brandeis, J., concurring). This principle has frequently been applied when the constitutional question is presented without an adequate factual basis, or where the question itself may change because of future actions of lower courts and administrative bodies. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569, 575; *Parker v. Los An-*

geles County, 338 U.S. 327; *Burton v. United States*, 196 U.S. 283, 295. Conversely, this Court has been aided in the adjudication of difficult constitutional issues when they were presented for decision on the basis of a full factual record describing in detail the operation of challenged programs. See *Tilton v. Richardson*, 403 U.S. 672, 680-682; *Lemon v. Kurtzman*, 403 U.S. 602, 615-622.

This Court should not decide the important constitutional questions which the provision of remedial educational services on private school premises raises without knowing all the detailed facts concerning the actual program under which those services are to be supplied. It should not decide the issue on the basis of what the court of appeals, in refusing to decide the constitutional question, properly characterized as "an abstract program of remedial teaching services which are not properly before us" (Pet. App. A26).

III. THE USE OF PUBLIC SCHOOL TEACHERS TO PROVIDE
REMEDIAL EDUCATIONAL SERVICES TO EDUCATIONALLY
DEPRIVED CHILDREN ON PRIVATE SCHOOL PREMISES
WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE OF
THE FIRST AMENDMENT

If, contrary to our submission in Point II, the Court should conclude that the constitutional issue is ripe for decision, then we submit that the use of public teachers to provide Title I services on the premises of religiously-affiliated schools would not violate the Establishment Clause of the First Amendment.

A. TITLE I IS A RELIGIOUSLY NEUTRAL STATUTE THAT PROVIDES EDUCATIONAL BENEFITS COMPARABLE IN FORM AND SCOPE TO THOSE THAT THIS COURT HAS UPHELD UNDER THE ESTABLISHMENT CLAUSE

The present statute, unlike the legislation aiding religiously-affiliated schools which this Court has recently invalidated (see *Lemon v. Kurtzman*, *supra*; *Levitt v. Committee for Public Education & Religious Liberty*, No. 72-269, *Committee for Public Education & Religious Liberty v. Nyquist*, No. 72-694, and *Sloan v. Lemon*, Nos. 72-459 and 72-620, all decided June 25, 1973), was not designed primarily to provide financial assistance to private schools. Its purpose was to enable local educational authorities to meet "the special educational needs of educationally deprived children" (20 U.S.C. 241a), no matter what schools they attend. As noted (*supra*, p. 6), fewer than 6 percent of the children in this country who received Title I aid in fiscal year 1971 were enrolled in private schools. The figures for Missouri are comparable. In Kansas City, where the respondents live, about 7,000 public school children were enrolled in Title I programs; it was estimated that there were 355 educationally deprived private school children residing in the eligible attendance area (Pet. App. A8), who presumably also would receive the services.

In contrast, the two State aid programs struck down in the *Lemon* case were specifically designed to alleviate the financial situation of the States' non-public schools and provided benefits only to those schools. *Lemon*, *supra*, 403 U.S. at 606-607, 609; *Sloan*, *supra*, slip op. 1-2. Similarly, the New York programs

which this Court invalidated last Term in *Levitt* and *Nyquist* involved various forms of financial aid given solely to non-public schools.

The form and scope of the educational benefits provided under Title I are comparable to those which this Court has upheld against challenges under the Establishment Clause in such cases as *Everson v. Board of Education*, 330 U.S. 1, where the State reimbursed parents for bus fares paid for transporting students to public and private schools; *Board of Education v. Allen*, 392 U.S. 236, involving a State plan under which public school authorities lent text books without charge to all students of the State, including those attending private schools, and in which the Court cited with approval its prior statement in *Everson* (330 U.S. at 16-17) that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (392 U.S. at 242); and *Tilton v. Richardson*, 403 U.S. 672, where the Court upheld the constitutionality of the Federal Higher Education Facilities Act of 1963, under which federal grants were made to colleges and universities, including religiously-affiliated ones, for the construction of facilities to be used for secular educational purposes.

Like the programs upheld in those cases, the Title I program is religiously neutral. It provides remedial educational services for all educationally deprived children, no matter which schools they attend. It is not designed to aid private schools. Indeed, since the remedial educational services to be provided under

Title I are required to be supplementary to those "made available from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(i))—i.e., they must be in addition to those the schools normally provide—Title I may fairly be viewed as not providing any aid to the religiously-affiliated schools in their normal operations. To whatever extent Title I does provide government aid to religiously-affiliated schools, therefore, the aid is at most indirect and peripheral. It is a far cry from the types of government assistance to religiously-affiliated schools that this Court has previously invalidated under the Establishment Clause.

B. TITLE I MEETS THE CRITERIA THIS COURT HAS APPLIED FOR DETERMINING WHETHER A STATUTE SATISFIES THE ESTABLISHMENT CLAUSE.

In *Committee for Public Education v. Nyquist*, *supra*, the Court summarized the "well defined three-point test that has emerged from our decisions" (slip. op. 14) that, "to pass muster under the Establishment Clause," a statute

first, must reflect a clearly legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion [slip. op. 15, citations omitted].

Title I satisfies all three of these criteria.

1. *Title I Has a Clearly Secular Purpose.*—As petitioners themselves recognize (Br. 29), Title I has a secular purpose. As previously explained (*supra*, pp. 7-9, 17-19), the aim of Congress was to provide important remedial educational services to all educationally deprived children without regard to whether they

attend public or private schools. The objective was not to aid religiously-affiliated schools but to help educationally deprived children regardless of the schools they attend.

2. Title I neither Advances nor Inhibits Religion.—As explained above (pp. 7-9, 17-19), Title I is religiously neutral. It provides remedial educational services to all children, including those attending private schools. No governmental funds are given to the private schools or used to pay teachers for conducting regular instruction in those schools. The educational services provided supplement the regular curriculum, and are performed exclusively by employees of the public educational agencies.

There is nothing in the Title I programs that furthers or aids the private schools in conducting the religious aspects of their educational programs, or inhibits them from doing so. Although the provision of Title I remedial services on the premises of religiously-affiliated schools could make those schools more attractive to the parents of children attending them, that collateral benefit is "not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment" (*Board of Education v. Allen*, *supra*, 392 U.S. at 242; see, also, *Everson v. Board of Education*, *supra*, 330 U.S. at 17-18).

Petitioners contend (Br. 30-34), however, that Title I and the Commissioner's regulations constitute a prohibited support of religion because they contain no effective safeguards to insure that the public school

teachers will not utilize the remedial educational instruction as a vehicle for inculcating religious beliefs. This possibility is so unlikely and remote that it affords no basis for concluding that the Title I program constitutes government support of religion.

As we have explained (*supra*, pp. 7-8, 9-10), the Title I programs are formulated, administered and operated by the public educational agencies. The teachers providing the services, no matter where they do so, are employed by and under the complete control of the public agencies.* Accordingly, there is not here present the "potential for conflict" that concerned this Court in *Levitt v. Committee for Public Education & Religious Liberty* (No. 72-269, decided June 25, 1973, slip op., 8), which struck down a New York statute providing grants to religious schools to prepare State-required examinations. There the Court noted (*ibid.*) "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." See *Lemon v. Kurtzman*, *supra*, 403 U.S. at 617, where this Court spoke of "the danger that a teacher under religious control and

* Petitioners contend (Br. 11, 27), on the basis of one law review article and two studies dealing with Title I in New Jersey and New York, that Title I teachers are actually recruited and controlled by the religious institutions. No evidence regarding those programs, or recruiting of teachers for Missouri programs, was presented to the district court. Accordingly, consideration of this contention would be inappropriate at this time.

discipline poses to the separation of the religious from the purely secular aspects of pre-college education."

In the present case, in contrast, the religiously-affiliated schools would have no control over either the content of the special remedial instruction or the way in which the instruction were given. Those determinations would be made by the public educational authorities solely on the basis of the secular standards provided in Title I and the Commissioner's regulations and guidelines. The public school teachers providing the services would not be subject to the authority and discipline of the people running the religiously-affiliated schools, but only to the control of the public agencies which hire, pay and direct them. As Mr. Justice Brennan pointed out, in explaining his vote to deny certiorari in *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921, where the lower court had upheld the provision of Title I remedial reading and remedial mathematics services to both public and private school students upon premises the school district had leased from a Catholic school:

[T]he school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration [*id.* at 926].

3. Title I Involves No Excessive Government Entanglement with Religion.—The basic character of the Title

I programs—under which employees of local educational authorities working under the control and supervision of those authorities provide supplementary remedial educational services to educationally deprived children pursuant to plans formulated and administered by the public authorities—insures that the programs will not involve excessive government entanglement with religion.

The contrary argument of petitioners (Br. 34-42) and *amicus curiae* Missouri Coalition for Public Education and Religious Liberty (Br. 28-36) relies mainly upon *Lemon v. Kurtzman*, *supra*. There this Court invalidated two State plans for providing financial aid to private schools, because they involved excessive government entanglement with religion. The aspects of those plans which constituted such entanglement, however, are not present in the Title I programs.

The two State plans struck down in those cases involved direct State grants (1) to private schools for the costs of teaching secular subjects and (2) to teachers of secular subjects in those schools. The administration and control of the teaching and the content of the secular courses were under the direct supervision and control of the religiously-affiliated schools. In those circumstances, as the Court noted, the State inevitably would be required to conduct "comprehensive, discriminating, and continuing surveillance" of the schools to assure that the secular purposes of the financial aid were observed (403 U.S. at 619).

In contrast, there would be no occasion for such public surveillance of private schools in connection with the operation of Title I programs. Those programs require no distinction to be made between secular and sectarian subjects, and are conducted by employees of public educational agencies under the complete control of those agencies.*

There is similarly no likelihood that providing Title I services on private school premises would create the serious potential for political divisiveness that also concerned the Court in *Lemon* (403 U.S. at 622-624). The State plans there involved annual legislative appropriations "that benefit relatively few religious groups" and that were thus likely to intensify "[p]olitical fragmentation and divisiveness on religious lines" (*id.* at 623). The Court distinguished (*ibid.*) *Walz v. Tax Commission*, 397 U.S. 664, which upheld State tax exemptions for real property owned by religious organizations and used for religious worship, on the ground that that decision "dealt with a status under state tax laws for the benefit of all religious groups," where the likelihood of such "[p]olitical fragmentation and divisiveness" was much less.

*Of course, there will be circumstances in which the public educational authorities will review the performance of Title I teachers who provide services on private school premises. But the purpose would not be, as petitioners suggest (Pet. Br. 36-37), to determine whether the teachers are fostering religion, but whether they are teaching effectively. This review would be required whether particular teachers teach in public or private schools, or in both.

In the present case, unlike the State plans involved in *Lemon*, the statute is not designed to benefit religiously-affiliated schools at all, and whatever benefit it may give them is collateral and incidental. Only about 5 percent of the children who would receive benefits under Title I attend private schools. "[I]n terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor" (*Nyquist, supra*, slip op. 36). In the present case, as in *Allen* and *Everson*, "the class of beneficiaries included *all* school children, those in public as well as those in private schools" (*id.* at 24, n. 38, emphasis in original). Here as in those cases, there is not sufficient potential for creating divisiveness to constitute a prohibited governmental entanglement with religion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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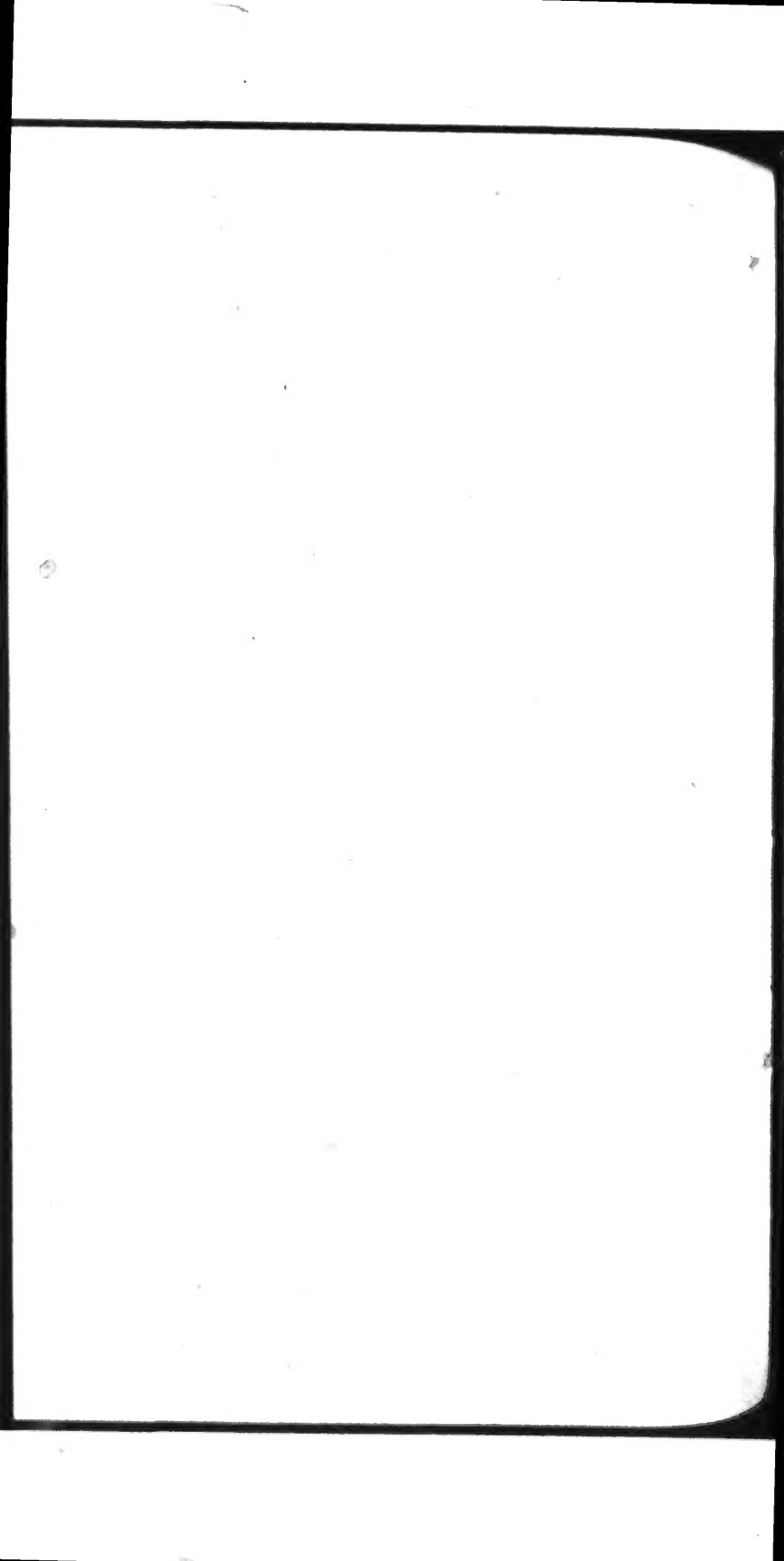
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JANUARY 1974.



(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHEELER ET AL. V. BARRERA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 73-62. Argued January 16, 1974—Decided June 10, 1974

Title I of the Elementary and Secondary Education Act of 1965 (the Act) provides for federal funding of special programs for educationally deprived children in both public and private schools. Respondents, parents of children attending nonpublic schools in Kansas City, Mo., brought this class action, alleging that petitioner state school officials arbitrarily and illegally were approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered eligible public school children, and seeking injunctive and other relief. Petitioners answered that the aid sought by respondents exceeded Title I's requirements and contravened the State's Constitution and state law and public policy. First Amendment issues were also raised. The District Court denied relief. The Court of Appeals reversed and remanded, holding that: petitioners were violating the requirement of the Act and implementing regulations that educationally deprived nonpublic school children be afforded a program comparable to that provided in public schools; if on-the-premises special teaching services are furnished public school children, then comparable programs must be provided nonpublic school children; the state constitutional provision barring use of "public" school funds in private schools did not apply to Title I funds; the question whether Title I funds were "public" within the meaning of the State Constitution was governed by federal law; and, since no plan for on-the-premises instruction in nonpublic schools had yet been implemented, the court would refuse to pass on petitioner's claims that the Establishment Clause of the First Amendment would be violated if Title I does require or permit such instruction. *Held*:

1. At this stage of the proceedings this Court cannot reach and decide whether Title I requires the assignment of publicly em-

Syllabus

played teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students. Pp. 11-22.

(a) While the Court of Appeals correctly ruled that the District Court erred in denying relief where it clearly appeared that petitioners had failed to comply with the Act's comparability requirement, the Court of Appeals' opinion is not to be read to the effect that petitioners must submit and approve plans that employ the use of Title I teachers on private school premises during regular school hours. P. 11.

(b) That court erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri law, since Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting federal funds. The key issue whether federal aid is money "donated to any state fund for public school purposes" within the meaning of the Missouri Constitution is purely a question of state and not federal law, and by characterizing the problem as one involving "federal" and not "state" funds, and then concluding that federal law governs, the Court of Appeals in effect nullified the Act's policy of accommodating state law. Pp. 12-15.

(c) It was unnecessary for the Court of Appeals to reach the issue whether on-the-premises nonpublic school instruction is permissible under state law, since in view of the fact that Title I does not obligate the State to provide such instruction but only to provide "comparable" (not identical) services, the illegality of such instruction under state law would not provide a defense to respondents' charge of noncompliance with Title I. Pp. 15-16.

(d) On remand, the petitioners and the local school agency have the option to provide for on-the-premises instruction for nonpublic school children, but if they do not choose this method or if it turns out that state law prevents its use, then the following options remain: (1) they may approve a plan that does not utilize nonpublic school on-the-premises instruction but that still complies with the Act's comparability requirement; (2) they may submit a plan that eliminates on-the-premises instruction in public schools and may resort, instead, to other means, such as neutral sites or summer programs; or (3) they may choose not to participate at all in the Title I program. Pp. 17-22.

2. The Court of Appeals properly declined to pass on the First Amendment issue, since, no order requiring on-the-premises non-

Syllabus

public school instruction having been entered, the matter was not ripe for review. Pp. 22-23.

3. While under the Act respondents are entitled to comparable services and therefore to relief, they are not entitled to any particular form of service, and it is the role of state and local agencies, not of the federal courts, at least at this stage, to formulate a suitable plan. Pp. 23-24.

475 F. 2d 1338, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion. WHITE, J., filed an opinion concurring in the judgment. MARSHALL, J., concurred in the result. DOUGLAS, J., filed a dissenting opinion.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-62

Hubert Wheeler et al., Petitioners, v. Anna Barrera et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Eighth Circuit.
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[June 10, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. § 241a *et seq.*, provides for federal funding of special programs for educationally deprived children in both public and private schools.

This suit was instituted on behalf of parochial school students who were eligible for Title I benefits and who claimed that the public school authorities in their area, in violation of the Act, failed to provide adequate Title I programs for private school children as compared with those programs provided for public school children. The defendants answered that the extensive aid sought by the plaintiffs exceeded the requirements of Title I and contravened the State's Constitution and state law and public policy. First Amendment rights were also raised by the parties. The District Court, concluding that the State had fulfilled its Title I obligations, denied relief. The United States Court of Appeals for the Eighth Circuit, by a divided vote, reversed. 475 F. 2d 1338 (1973). We granted certiorari to examine serious questions that appeared to be present as to the scope and constitutionality of Title I. 414 U. S. 908 (1973).

I

Title I is the first federal-aid-to-education program authorizing assistance for private school children as well as for public school children. The Congress, by its statutory declaration of policy,¹ and otherwise, recognized that all children from educationally deprived areas do not necessarily attend the public schools, and that, since the legislative aim was to provide needed assistance to educationally deprived children rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act.²

Since the Act was designed to be administered by local public education officials,³ a number of problems naturally

¹ "In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U. S. C. § 241a.

² The implementing regulations, 45 CFR § 116.1 (1973), set forth a number of definitions, some in common with, and others in addition to, the definitions contained in the Act itself, 20 U. S. C. § 244. They draw no distinction between public and nonpublic school children. Specifically:

"'Educationally deprived children' means those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large." 45 CFR § 116.1 (i).

³ In order for a local Title I proposal to be approved and a grant received, the local agency must give:

"satisfactory assurance that the control of funds provided under

arise in the delivery of services to eligible private school pupils. Under the administrative structure envisioned by the Act, the primary responsibility for designing and effectuating a Title I program rests with what the Act and the implementing regulations describe as the "local educational agency."⁴ This local agency submits to the "State educational agency"⁵ a proposed program designed to meet the special educational needs of educationally deprived children in school attendance areas with high concentrations of children from low income families. The state agency then must approve the local plan and, in turn, forward the approved proposal to the United States Commissioner of Education, who has the ultimate responsibility for administering the program and dispensing the appropriated and allocated funds. In order to receive state approval, the proposed plan, among other requirements, must be designed to provide the eligible private school students services that are "comparable in quality, scope, and opportunity for participation to those

this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property." 20 U. S. C. § 241e (a) (3).

⁴ "[T]he term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school" 20 U. S. C. § 244 (6) (B). See also 45 CFR § 116.1 (r) (1973).

⁵ "The term 'State educational agency' means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools." 20 U. S. C. § 244 (7). See also 45 CFR § 116.1 (aa) (1973).

provided for public school children with needs of equally high priority." USOE Program Guide No. 44, ¶ 4.5 (1968),* reproduced in Title I ESEA Participation of Private School Children—A Handbook for State and Local School Officials, U. S. Dept. of HEW (1971) (hereinafter referred to as the "Handbook").

The questions that arise in this case concern the scope of the State's duty to insure that a program submitted by a local agency under Title I provides "comparable" services for eligible private school children.

II

Plaintiff-respondents are parents of minor children attending elementary and secondary nonpublic schools in the inner city area of Kansas City, Missouri. They instituted this class action in the United States District Court for the Western District of Missouri on behalf of themselves and their children, and others similarly situated, alleging that the defendant-petitioners, the then State Commissioner of Education and the members of the Missouri Board of Education, arbitrarily and illegally

*The regulations state:

"Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation." 45 CFR § 116.19 (a) (1973).

"The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools." 45 CFR § 116.19 (b) (1973).

were approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered eligible public school children. The complaint sought an injunction restraining continued violations of the Act and an accounting and restoration of some \$13,000,000 in Title I funds allegedly misapplied from 1966 to 1969.

The District Court initially dismissed the complaint on the alternative grounds of failure to exhaust state remedies and abstention. The Court of Appeals reversed this dismissal and remanded the case for trial. 441 F. 2d 795 (CA8 1971). It observed, "[W]e indicate no opinion on the merits of the alleged noncompliance by the state officials." *Id.*, at 801.

On remand, the District Court found that while most of the Title I funds allocated to public schools in Missouri were used "to employ teachers to instruct in remedial subjects," the petitioners had refused "to approve any applications allocating money to teachers in parochial schools during regular school hours." Petition for Writ of Certiorari A40. The court did find that petitioners in some instances had approved the use of Title I money "to provide mobile educational services and equipment, visual aids, and educational radio and television in parochial schools. Teachers for after-school classes, weekend classes, and summer school classes, all open to parochial school pupils, have all been approved." *Id.*, at A40-A41.

In what perhaps may be described as something less than full cooperation by both sides, the possibility of providing "comparable" services was apparently frustrated by the fact that many parochial schools would accept only services in the form of assignment of federally funded Title I teachers to teach in those schools during regular school hours. At the same time, the petitioners refused to approve any program providing

for on-the-premises instruction on the grounds that it was forbidden under both Missouri law and the First Amendment and, furthermore, that Title I did not require it. Since the larger portion (over 65%) of Title I funds allocated to Missouri has been used to provide personnel for remedial instruction, the effect of this stalemate is that substantially less money per pupil has been expended for eligible students in private schools, and that the services provided in those schools in no sense can be considered "comparable."

Faced with this situation, the District Court recognized that "This head-on conflict . . . has resulted in an undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and non-public schools in some local school districts in the state." *Id.*, at A41.

Nonetheless, the District Court denied relief. It rea-

The Court of Appeals noted:

"The practice in Missouri as a whole in prior years has been to give comparable equipment, material and supplies to eligible private school children, but to exclude any sharing whatsoever of personnel services. Most Title I public school programs in Missouri involve remedial reading, speech therapy and special mathematics classes, thus the largest proportion of the costs of these projects involves salaries for teachers and teacher aides. After the first two years of Title I, expenditures in Missouri for instructional personnel have run from 65 per cent to 70 per cent of the total grant. The remaining funds are used for equipment and materials, health and counseling services, transportation, and plant maintenance. One difficulty with providing only equipment and materials is that even minimal sharing of expenses for equipment and materials soon reaches a saturation point; in fact, the state guidelines permit only 15 per cent of any appropriation to be spent on equipment and instructional materials. The result of this plan for the deprived school child has been to create a disparity in expenditures in many school districts ranging from approximately \$10 to \$85 approved for the educationally disadvantaged private school child to approximately \$210 to \$275 allocated for the deprived public school child." 475 F. 2d, at 1345.

soned that since the petitioners were under no statutory obligation to provide on-the-premises nonpublic school instruction, the failure to provide that instruction could not violate the Act. The court further reasoned that since the petitioners apparently had approved all programs "except those requesting salaried teachers in the nonpublic schools," *id.*, at A43, they had fulfilled their commitment. The court did not directly consider whether programs in effect without on-the-premises private school instruction complied with the comparability requirement despite gross disparity in the services delivered.

The Court of Appeals reversed. It traced the legislative history of Title I, examined the language of the statute and the regulations, and noted "that the Act and the regulations require a program for educationally deprived non-public school children that is comparable in quality, scope and opportunity, which may or may not necessarily be equal in dollar expenditures to that provided in the public schools." 475 F. 2d, at 1344. The court then observed that the Act does not mandate that services take any particular form and that, within the confines of the comparability requirement, the Act left to the state and local agencies the task of designing a program best suited to meet the particularized needs of both the public school children and the nonpublic school children in the area. After reviewing the somewhat unique situation existing in Missouri, where funds were grossly malapportioned due to the refusal to employ either dual enrollment or Title I teachers on private school premises,* the court concluded that the petitioners were in violation of the comparability requirement:

"Thus, we find that when the need of educationally disadvantaged children requires it, Title I authorizes

* An informal survey conducted by the United States Office of Ed-

special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises. In other words, we think it clear that the Act demands that if such special services are furnished public school children, then comparable programs, if needed, must be provided the disadvantaged private school child." *Id.*, at 1352.

In response to petitioners' argument that Missouri law forbids sending public school teachers into private schools, the court held that the state constitutional provision barring use of "public" school funds in private schools had no application to Title I funds. The court reasoned that although the Act was generally to be accommodated to state law, the question whether Title I funds were "public," within the meaning of the Missouri Constitution,⁹

education revealed that Missouri was the only State which did not use either dual enrollment or on-the-premises private school instruction as a means of providing Title I services. Brief for Respondents 93-95.

⁹ The Missouri Constitution, Art. 9, § 5, provides:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which *shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever.*" (Emphasis supplied.)

The Constitution also provides, Art. 9, § 8:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, sem-

must necessarily be decided by federal law. *Id.*, at 1351-1353. Finally, the court refused to pass on petitioners' claim that the Establishment Clause of the First Amend-

—
inary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

Finally, the Constitution's Bill of Rights, Art. 1, § 7, provides:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In *Special District v. Wheeler*, 408 S. W. 2d 60, 63 (1966), the Supreme Court of Missouri, two judges dissenting, held that "the use of public school moneys to send speech teachers . . . into the parochial schools for speech therapy" was not a use "for the purpose of maintaining free public schools," within the meaning of Art. 9, § 5, of the State's Constitution, and therefore was a practice "unlawful and invalid." That case did not involve federal funds.

The question in the present case is whether Title I grants to the State are "donated . . . for public school purposes" and therefore subject to the proscription held to exist in *Special District*. After that case was decided by the Missouri court, the State Board of Education promulgated a regulation governing the use of Title I funds in Missouri. It provides:

"Special educational services and arrangements, including broadened instructional offerings made available to children in private schools, shall be provided at public facilities. Public school personnel shall not be made available in private facilities. This does not prevent the inclusion in a project of special educational arrangements to provide educational radio and television to students at private schools." See 475 F. 2d, at 1350.

In a formal opinion the Attorney General of Missouri has taken the opposing view, stating, "We do not believe that an appropriation of this type [Title I] converts federal aid into state aid, thereby

ment would be violated if Title I, in fact, does require or permit service by public school teachers on private school premises. The reason stated for the court's refusal was that since no plan had yet been implemented, the court "must refrain from passing upon important constitutional questions on an abstract or hypothetical basis." *Id.*, at 1354.

The dissent argued that although Title I permits the assignment of Title I teachers to nonpublic schools, it does not mandate that assignment, and that if the Act is to be read as embracing such a mandate, it would present substantial First Amendment problems that could not be avoided. 475 F. 2d, at 1358-1359.¹⁰

making it subject to the Missouri constitutional provisions." The opinion concludes:

"It is the opinion of this office that the Elementary and Secondary Education Act of 1965 provides that, under certain circumstances and to the extent necessary, public school personnel, paid with federal funds pursuant to this program, may be made available on the premises of private schools to provide certain special services to eligible children and that Missouri law would not prevent public school personnel, paid with federal funds, from providing these services on the premises of a private school." Op. Atty. Gen. No. 26 (1970).

This rather fundamental intrastate legal rift apparently has resulted in the Missouri Attorney General's nonappearance for the petitioners in the present litigation.

There is no Missouri case on point. Cf. *State ex rel. School District v. Nebraska State Board of Education*, 188 Neb. 1, 195 N. W. 2d 161 (1972), cert. denied, 409 U. S. 921.

¹⁰ On remand from the Court of Appeals the District Court on May 19, 1973, entered an "Injunction and Judgment Issued in Compliance with Mandate" requiring use of Title I personnel on private school premises during regular school hours if such personnel are also used in public schools during regular school hours. Petition for Writ of Certiorari A45-A47. Petitioners appealed from that judgment, but the Court of Appeals dismissed the appeal as moot after we granted certiorari. Our grant of certiorari was to

III

In this Court the parties are at odds over two issues: First, whether on this record Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students, and second, whether that requirement, if it exists, contravenes the First Amendment. We conclude that we cannot reach and decide either issue at this stage of the proceedings.

A. Title I Requirements. As the case was presented to the District Court, petitioners clearly had failed to meet their statutory commitment to provide comparable services¹¹ to children in nonpublic schools. The services provided to the class of children represented by respondents were plainly inferior, both qualitatively and quantitatively, and the Court of Appeals was correct in ruling that the District Court erred in refusing to order relief. But the opinion of the Court of Appeals is not to be read to the effect that petitioners *must* submit and approve plans that employ the use of Title I teachers on private school premises during regular school hours.

review the judgment of the Court of Appeals entered pursuant to the opinion reported at 475 F. 2d 1338. The judgment of the District Court on remand is not presently before us.

¹¹The Act itself does not mention "comparability." It requires only that the state agency, in approving a plan, must determine "that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate." 20 U. S. C. § 241e (a) (2). The Regulations, 45 CFR §§ 116.19 (a) and (b) (1973), are the source of the comparability requirement. See n. 6, *supra*.

The legislative history, the language of the Act, and the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act. There was a pronounced aversion in Congress to "federalization" of local educational decisions.

"It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district." H. R. Rep. No. 143, 89th Cong., 1st Sess. 5 (1965); S. Rep. No. 146, 89th Cong., 1st Sess. 9 (1965).

And 20 U. S. C. § 1232a provides, *inter alia*:

"No provision of . . . the Elementary and Secondary Education Act of 1965 . . . shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . ."

Although this concern was directed primarily at the possibility of HEW's assuming the role of a national school board, it has equal application to the possibility of a federal court's playing an overly active role in supervising the manner of Title I expenditures.

At the outset, we believe that the Court of Appeals erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri law. Whatever the case might be if there were no expression of specific congres-

sional intent,¹² Title I evinces a clear intention that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds.¹³ The key issue, namely, whether federal aid is money "donated to any

¹²The case from this Court primarily cited by the Court of Appeals for the proposition that federal, not state, law should govern, is *United States v. 93,970 Acres of Land*, 360 U. S. 328 (1959). There, however, this Court said:

"We have often held that where essential interests of the Federal Governments are concerned, federal law rules unless Congress chooses to make state laws applicable. It is apparent that no such choice has been made here" (footnote omitted). *Id.*, at 332-333.

In the present case, Congress, in fact, has made this choice, see n. 13, *infra*, and thus the cited case is not controlling.

¹³During the debates in the House, it was generally understood that state constitutional limitations were to be accommodated. For example, at one point Congressman Goodell raised the possibility that state law would preclude certain forms of services to nonpublic schools. The response from Congressman Perkins, Chairman of the Subcommittee, was:

"The gentleman is an able lawyer and he well knows you cannot do anything in this bill that you cannot do under the State law." 111 Cong. Rec. 5744 (1965).

Responding to a later observation by Mr. Goodell that dual enrollment was prohibited by 28 States, Congressman Carey responded:

"The prohibition applies to a single type of program. That is why we have a multiplicity of programs in this, so that they can choose one in helping the children who are disadvantaged in any one public school." *Id.*, at 5758.

Congressman Thompson subsequently observed:

"Therefore, the provision about providing full assistance under title I is up to the public school district, subject to the laws of the States." *Ibid.*

See also 111 Cong. Rec. 5979 (remarks of Mr. Thompson) (1965); *id.*, at 5757 (remarks of Mr. Goodell); *id.*, at 5747 (remarks of Mr. Perkins).

The Handbook clearly recognizes that state law is to be accommodated:

"Many State departments of education found severe restrictions

state fund for public school purposes," within the meaning of the Missouri Constitution, Art. 9, § 5, is purely a question of state and not federal law. By characterizing the

with respect to the kind of services that their respective State constitutions and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

"The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

"* Dual enrollment may not be allowed.

"* Public school personnel may not perform services on private school premises.

"* Equipment may not be loaned for use on private school premises.

"* Books may not be loaned for use on private school premises.

"* Transportation may not be provided to private school students.

"Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

"When ESEA was passed in 1965, each State submitted an assurance to the U. S. Office of Education in which the State department of education stated its intention to comply with Title I and its regulations, and the State attorney general declared that the State board of education had the authority, under State law, to perform the duties and functions of Title I as required by the Federal law and its regulations. While State constitutions, laws, and their interpretations limit the options available to provide services to private school students, this fact, in itself, does not relieve the State educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the Federal law and regulations.

"A number of school officials realized that they could not submit the required assurance because of the restrictions applying to private school students which were operative in their States. The impasse was successfully [sic] resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed programs.

"Other States have proposed legislation which would allow the SEA to administer Title I according to the Federal requirements. Still others have applied the restrictions of the State to Title I and

problem as one involving "federal" and not "state" funds, and then concluding that federal law governs, the Court of Appeals, we feel, in effect nullified the Act's policy of accommodating state law. The correct rule is that the "federal law" under Title I is to the effect that state law should not be disturbed. If it is determined, ultimately, that the petitioners' position is a correct exposition of Missouri law, Title I requires not that that law be preempted, but, rather, that it be accommodated by the use of services not proscribed under state law. The question whether Missouri law prohibits the use of Title I funds for on-the-premises private school instruction is still unresolved. See n. 9, *supra*.

Furthermore, in the present posture of this case, it was unnecessary for the federal court even to reach the issue whether on-the-premises parochial school instruction is permissible under state law. The state law question appeared in the case by way of petitioners' defense that it could not provide on-the-premises services because it was prohibited by the State's Constitution. But, as is discussed more fully below, the State is not obligated by Title I to provide on-the-premises instruction. The mandate is to provide "comparable" services. Assuming, *arguendo*, that state law does prohibit on-the-premises instruction, this would not provide a defense to respondents' complaint that comparable services are not being provided. The choice of programs is left to the State with the proviso that comparable (not identical) programs are also made available to eligible private school children. If one form of services to parochial school children is rendered unavailable because of state constitutional proscriptions, the solution is to employ an

have relied upon the initiative of school administrators to develop a program that would meet the Federal requirements." *Id.*, at 19-20.

acceptable alternative form. In short, since the illegality under state law of on-the-premises instruction would not provide a defense to respondents' charge of noncompliance with Title I, there was no reason for the Court of Appeals to reach this issue. By deciding that on-the-premises instruction was not barred by state law, the court in effect issued an advisory opinion. Even apart from traditional policies of abstention and comity, it was unnecessary to decide this question in the current posture of the case.

The Court of Appeals properly recognized, as we have noted, that petitioners failed to meet their broad obligation and commitment under the Act to provide comparable programs.⁴⁴ "Comparable," however, does not mean "identical," and, contrary to the assertions of both sides,

⁴⁴ HEW's Office of Education refers to the comparability requirement as follows:

"The needs of private school children in the eligible areas may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." USOE Program Guide No. 44, ¶ 4.5 (1968), Handbook, at 41-42. See 45 CFR § 116.18 (a).

45 CFR § 116.19 (c) provides:

"The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade."

See also Handbook, at 1, 10-11.

we do not read the Court of Appeals' opinion or, for that matter, the Act itself, as ever requiring that identical services be provided in nonpublic schools.¹⁵ Congress recognized that the needs of educationally deprived children attending nonpublic schools might be different than those of similar children in public schools; it was also recognized that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area. See n. 9, *supra*.¹⁶ Title I was not intended to override these individualized state restrictions. Rather, there was a clear intention that the assistance programs be designed on local levels so as to accommodate the restrictions.

Inasmuch as comparable, and not identical, services are required, the mere fact that public school children are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical pro-

¹⁵ The Handbook, at 6, referring to the "comparability" definition in n. 14, *supra*, states:

"Basically, what the regulations and guidelines are saying is this: when a group of children in a private school are found to have a need which is similar (not identical) to a need found in a group of public school children, the response to that need with Title I resources should be similar (not identical) in scope, quality, and opportunity for participation for both groups."

¹⁶ The United States, as *amicus curiae*, states:

"Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private school children (*e. g.*, prohibition against dual enrollment). Accordingly, Title I programs may be provided in a different manner to private and to public school children. For example, remedial services for private school students might be provided outside their regular classroom, while being provided in the regular classroom for public school students. In addition, the content of the services could differ if the 'special educational needs' required to be met under 20 U. S. C. 241e (a)(1)(A) of the two groups differ" (footnote omitted). Brief for the United States as *Amicus Curiae* 10.

vision for private school children.¹⁷ Congress expressly recognised that different and unique problems and needs might make it appropriate to utilise different programs in the private schools. A requirement of identity would run directly counter to this recognition. It was anticipated, to be sure, that one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction,¹⁸ and on remand this is an option open to

¹⁷ The State, of course, may not utilise the "comparability" provision so as to provide an inferior program. A year after the Act was passed, the House Committee on Education and Labor issued a Supplemental Report stating:

"While the committee and the Council have emphasized the importance of adherence to constitutional safeguards, the committee does not expect that such considerations will be simply a device by which only token communication with private school administrators is extended, or worse yet, by which the projects in which private schoolchildren can participate are inconvenient, awkwardly arranged, or poorly conceived. To the contrary, it is expected that earnest efforts will be made to ascertain from private school administrators an accurate appraisal of underachievement and other special needs of educationally disadvantaged children who do not attend the public schools. Projects for such children should be so designed as to effectively eliminate those factors which preclude the educationally deprived child from gaining full benefit from the regular academic program offerings in the private institution in which he or she may be enrolled." H. R. Rep. No. 1814, Part 2, 89th Cong., 2d Sess., 3 (1966).

¹⁸ The Senate Report outlined the circumstances in which this type of service would be appropriate:

"It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school." S. Rep. No. 146, 89th Cong., 1st Sess., 12 (1965). See 45 CFR § 116.19 (e), 111 Cong. Rec. 5547 (remarks of Congressman Perkins and Carey) (1965).

these petitioners and local agency. If, however, petitioners choose not to pursue this method, or if it turns out that state law prevents its use, three broad options still remain:

First, the State may approve plans that do not utilize on-the-premises private school Title I instruction but, nonetheless, still measure up to the requirement of comparability. Respondents appear to be arguing here that it is impossible to provide "comparable" services if the public schools receive on-the-premises Title I instruction while private school children are reached in an alternative method. In support of their position, respondents argue, "The most effective type of services is that provided by a teacher or other specialist during regular school hours. There is nothing comparable to services of personnel except the services of personnel." Brief for Respondents 49. In essence, respondents are asking this Court to hold, as a matter of federal law, that one mode of delivering remedial Title I services is superior to others. To place on this Court, or on any federal court, the responsibility of ruling on the relative merits of various possible Title I programs seriously misreads the clear intent of Congress to leave decisions of that kind to the local and state agencies. It is unthinkable, both in terms of the legislative history and the basic structure of the federal judiciary, that the courts be given the function of measuring the comparative desirability of various pedagogical methods contemplated by the Act.

In light of the uncontested constitutional proscription in Missouri against dual enrollment, it may well be a significant challenge to these petitioners and the local agencies in their State to devise plans that utilize on-the-premises public school instruction and, at the same time, forego on-the-premises private school instruction. We cannot say, however, that this is an impossibility; by relying upon "the initiative of school administrators to

develop a program that would meet the Federal [comparability] requirements," Handbook, at 20, it may well be possible to develop and submit an acceptable plan under Title I.

Of course, the cooperation and assistance of the officials of the private school is obviously expected and required in order to design a program that is suitable for the private school. It is clear, however, that the Act places ultimate responsibility and control with the public agency, and the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests. The private school may refuse to participate if the local program does not meet with its approval. But the result of this would then be that the private school's eligible children, the direct and intended beneficiaries of the Act, would lose. The Act, however, does not give the private school a veto power over the program selected by the local agency.¹³

In sum, although it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools. On the facts of this case, petitioners have been approving plans that do not meet this requirement, and certainly, if public school children continue to receive on-the-premises Title I instruction, petitioners should not approve plans that fail to make a genuine effort to employ comparable alternative programs that make up for the lack of on-the-premises instruction for the nonpublic school children. A program which pro-

¹³ "There are no easy solutions to the logistical problems. However, when the legal situation allows several options and goodwill exists between public and private school representatives, the logistical problem can be solved or reasonably reduced." Handbook, at 23.

vides instruction and equipment to the public school children and the same equipment but no instruction to the private school children cannot, on its face, be comparable. In order to equalize the level and quality of services offered, something must be substituted for the private school children. The alternatives are numerous.²⁰ Providing nothing to fill the gap, however, is not among the acceptable alternatives.

Second, if the State is unwilling or unable to develop a plan which is comparable, while using Title I teachers in public but not in private schools, it may develop and submit an acceptable plan which eliminates the use of on-the-premises instruction in the public schools and, instead, resorts to other means, such as neutral sites or summer programs that are less likely to give rise to the gross disparity present in this case.

Third, and undoubtedly least attractive for the educationally deprived children, is nonparticipation in the program. Indeed, under the Act, the Commissioner, subject to judicial review, 20 U. S. C. § 241k, may refuse to provide funds if the State does not make a bona fide effort

²⁰ A listing of possible programs suggested to the Senate Committee appears in S. Rep. No. 146, 89th Cong., 1st Sess., 10-11 (1965). Among the examples there listed are teacher aids and instructional secretaries; institutes for training teachers in special skills; supplementary instructional materials; curriculum materials center for disadvantaged children; preschool training programs; remedial programs, especially in reading and mathematics; enrichment programs on Saturday morning and during summer; instructional media centers to provide modern equipment and materials; programs for the early identification and prevention of dropouts; home and school visitors and social workers; supplemental health and food services; class rooms equipped for television and radio instruction; mobile learning centers; educational summer camps; summer school and day camp; shop and library facilities available after regular school hours; work experience programs; Saturday morning special opportunity classes; home oriented bookmobiles; afterschool study centers; and pupil exchange programs.

to formulate programs with comparable services. 20 U. S. C. § 241j.

B. First Amendment. The second major issue is whether the Establishment Clause of the First Amendment prohibits Missouri from sending public school teachers paid with Title I funds into parochial schools to teach remedial courses. The Court of Appeals declined to pass on this significant issue, noting that since no order had been entered requiring on-the-premises parochial school instruction, the matter was not ripe for review. We agree. As has been pointed out above, it is possible for the petitioners to comply with Title I without utilizing on-the-premises parochial school instruction. Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full-time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time we intimate no view as to the Establishment Clause effect of any particular program.

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, e. g., *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and *Tilton v. Richardson*, 403 U. S. 672 (1971). It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to

render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding.

The Court of Appeals disposed of the case as follows:

"The case is remanded to the district court with directions to enjoin the defendants from further violation of Title I of ESEA, and it is further ordered that the court retain continuing jurisdiction of the litigation for the purpose of requiring, within reasonable time limits, the imposition and application of guidelines which will comport with Title I and its regulations. Such guidelines must provide the lawful means and machinery for effectively assuring educationally disadvantaged non-public school children in Missouri participation in a meaningful program as contemplated within the Act which is comparable in size, scope and opportunity to that provided eligible public school children. Such guidelines shall be incorporated into an appropriate injunctive decree by the district court" (footnotes omitted). 475 F. 2d, at 1355-1356.

We affirm this disposition with the understanding that petitioners will be given the opportunity to submit guidelines insuring that only those projects that comply with the Act's requirements and this opinion will be approved and submitted to the Commission. It is also to be understood that the District Court's function is not to decide which method is best, or to order that a specific form of service be provided. Rather, the District Court is simply to assure that the state and local agencies fulfill their part of the Title I contract if they choose to accept Title I funds. Cf. *Lau v. Nichols*, — U. S. — (1974). The comparability mandate is a broad one, and in order to implement the overriding concern with localized control of Title I programs, the District Court should make every effort to defer to the judgment of the petitioners and of

the local agency. Under the Act, respondents are entitled to comparable services, and they are, therefore, entitled to relief. As we have stated repeatedly herein, they are not entitled to any particular form of service, and it is the role of the state and local agencies, and not of the federal courts, at least at this stage, to formulate a suitable plan.

On this basis, the judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE MARSHALL concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 73-62

Hubert Wheeler et al., Petitioners, v. Anna Barrera et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Eighth Circuit.
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[June 10, 1974]

MR. JUSTICE POWELL, concurring.

The Court holds that under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. § 241a *et seq.*, federal courts may not ignore state-law prohibitions against the use of publicly employed teachers in private schools, *ante*, p. 12, that Title I does not mandate on-the-premises instruction in private schools, *id.*, p. 15, and that Title I does not require that the services to be provided in private schools be identical in all respects to those offered in public schools. *Id.*, p. 17. It is thus unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment. *Id.*, p. 11. On that basis, I join the Court's opinion. I would have serious misgivings about the constitutionality of a statute that required the utilization of public-school teachers in sectarian schools. See *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973).

OFFICE OF THE ATTORNEY GENERAL

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[June 10, 1974]

MR. JUSTICE WHITE, concurring in the judgment.

As I read the majority opinion, the Court understands well enough that Title I funds are being used in Missouri to pay the salaries of teachers giving special instruction on public school premises, that the State is obligated to furnish comparable services to private schools and that the State has not satisfied the comparability requirement. It must do so if it is to continue to use Title I funds in the manner they are now being used.

The Court intimates no opinion as to whether using federal funds to pay teachers giving special instruction on private school premises would be constitutional. It suggests, however, that there may be other ways of satisfying the comparability requirement that the State should consider; and unless the State is being asked to chase rainbows, it is inferred that there are programs and services comparable to on-the-premises-instruction that the State could furnish private schools without violating the First Amendment. I would have thought that any such arrangement would be impermissible under the Court's recent cases construing the Establishment Clause. Not having joined those opinions, I am pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance sectarian instruction of students in private elementary and second-

ary schools. If this is the case, I suggest that the Court should say so expressly. Failing that, however, I concur in the judgment.

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MR. JUSTICE DOUGLAS, dissenting.

The case comes to us in an attractive posture, as the Act of Congress is in terms aimed to help "educationally deprived" children, whether they are in public or parochial schools, and I fear the judiciary has been seduced. But we must remember that "the propriety of the legislature's purposes may not immunize from further scrutiny a law which either has a primary effect which advances religion, or which fosters excessive entanglements between Church and State." *Committee for Public Education v. Nyquist*, 413 U. S. 756, 774.

All education in essence is aimed to help children, whether bright or retarded. Schools do not exist—whether public or parochial—to keep teachers employed. Education is a skein with many threads—from classical Greek to Latin, to grammar, to philosophy, to science, to athletics, to religion. There might well be political motivation to use federal funds to make up deficits in any part of a school's budget or to strengthen it by financing all or a part of any sector of educational activity.

There are some who think it constitutionally wise to do so; and others who think it is constitutionally permissible. But the First Amendment says "Congress shall make no laws respecting an establishment of

religion." In common understanding there is no surer way of "establishing" an institution than by financing it. That was true at the time of the adoption of the First Amendment. Madison, one of its foremost authors, fought the battle in Virginia where the *per capita* minimal levy on each person was no more than three pence. Yet if the State could finance a church at three pence *per capita*, the principle of "establishment" would be approved and there would be no limit to the amount of the money the Government could add to church coffers. That was the teaching of his REMONSTRANCE.¹ As Mr. Justice Black stated it, "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, 330 U. S. 1, 16.²

Parochial schools are adjuncts of the church established at a time when state governments were highly discriminatory against some sects by introducing religious training in the public schools. The tale has been told often;³ and there is no need to repeat it here. Parochial

¹ Madison's Remonstrance is reprinted in the appendices to *Everson v. Board of Education*, 330 U. S. 1, 63 (Rutledge, J., dissenting), and *Waltz v. Tax Comm'n*, 397 U. S. 664, 700 (Douglas, J., dissenting).

² *Everson* was a 5-4 decision sustaining a state law which provided reimbursement to parents of children in sectarian schools for the cost of public bus transportation used by the students in traveling to school, but even the majority recognized that the law went to the "verge" of forbidden territory under the Religion clauses of the First Amendment. 330 U. S., at 16. Although I was in the majority in that case, I have since expressed my doubts about the correctness of that decision, e. g., *Engel v. Vitale*, 370 U. S., 421, 443; *Waltz v. Tax Comm'n*, 397 U. S. 664, 703.

³ See *Lemon v. Kurtzman*, 403 U. S. 602, 628-629 (Douglas, J., concurring).

schools are tied to the proclamation and inculcation of a particular religious faith—sometimes Catholic, sometimes Presbyterian, sometimes Anglican, sometimes Lutheran, and so on.

The emanations from the Court's opinion are, as suggested by JUSTICE WHITE, at war with our prior decisions. Federal financing of an apparently nonsectarian aspect of parochial school activities, if allowed, is not even a subtle evasion of First Amendment prohibitions. The parochial school is a unit; its budget is a unit; pouring in federal funds for what seems to be a nonsectarian phase of parochial school activities "establishes" the school so that in effect, if not in purpose, it becomes stronger financially and better able to proselytize its particular faith by having more funds left over for that objective. Allowing the State to finance the secular part of a sectarian school's program "makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries." *Lemon v. Kurtzman*, 403 U. S. 602, 641 (DOUGLAS, J., concurring).

Nor could the program here be immunized from scrutiny under the Establishment Clause by portraying this aid as going to the children rather than to the sectarian schools. See *Committee for Public Education v. Nyquist*, *supra*, at 781 *et seq.* That argument deserves no more weight in the Establishment Clause context than it received under the Equal Protection Clause of the Fourteenth Amendment, where we summarily affirmed decisions striking down state schemes to circumvent the constitutional requirement of racial integration in public schools granting tuition aid to parents who sent their children to segregated private schools. *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, *aff'd*, 389 U. S. 571, and 296 F. Supp. 686, *aff'd*, 393 U. S. 17. And see *Griffin v. County School Board*, 377 U. S. 218.

The present case is plainly not moot; a case of controversy exists; and it is clear that if the traditional First Amendment barriers are to be maintained, no program serving students in parochial schools could be designed under this Act—whether regular school hours are used, or after-school hours, or weekend hours. The plain truth is that under the First Amendment, as construed to this day, the Act is unconstitutional to the extent it supports sectarian schools, whether directly or through its students.

We should say so now, and save the endless hours and efforts which hopeful people will expend in an effort to constitutionalize what is impossible without a constitutional amendment.

